

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MINNESOTA

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4 United States of America,) CR 10-159(1) (DWF/SRN)
5)
6 Plaintiff,) SENTENCING HEARING
7)
8 -v-)
9)
10 Barry Vincent Ardolf,) July 12, 2011
11) 9:30 o'clock, a.m.
12 Defendant.) St. Paul, Minnesota
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14 BEFORE THE HONORABLE JUDGE DONOVAN W. FRANK

15 UNITED STATES DISTRICT COURT JUDGE

16 CRIMINAL SENTENCING HEARING PROCEEDINGS
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1 (In open court.)

2 THE COURT: You may be seated. Thank you.
3 Why don't we have -- I will leave it to the discretion
4 of counsel. Obviously, we can start with Mr. O'Brien if
5 you want to note your presence for the record, along
6 with Mr. Ardolf at counsel table?

7 MR. O'BRIEN: Good morning, Your Honor. I am
8 Kevin O'Brien. I am remaining as standby counsel for
9 Mr. Ardolf, who is present today.

10 THE COURT: I will come back to that issue in
11 just a moment.

12 We will just make clear what everybody's --
13 what the scope of that representation is as we begin
14 this hearing. So, all right?

15 MR. O'BRIEN: Sure.

16 MR. RANK: Good morning, Your Honor.
17 Assistant United States Attorney Tim Rank, appearing on
18 behalf of the United States. And with me at counsel
19 table are Assistant United States Attorney Laura
20 Provinzino; Assistant United States Attorney Jim
21 Alexander is present to address forfeiture issues, Your
22 Honor. And FBI Special Agent Bob Cameron is also at
23 counsel table.

24 THE COURT: Good morning. Let me indicate my
25 understanding, and actually how I typically would

1 handle -- how most sentencings are handled. And so we
2 will see procedurally what the respective views of the
3 parties are.

4 Generally, the first thing we discuss, one
5 because the law requires it and the parties are entitled
6 to know from the Court, is what the applicable
7 guidelines are. Not to be confused with -- and the not
8 to be confused with phrase is more for the benefit of
9 the non-lawyers in the room with the congressional
10 maximums and the issues of consecutive and concurrent,
11 because that is a separate issue.

12 But, generally, we begin with, well, what are
13 the applicable advisory guidelines? And that is a
14 second issue from what mandatory minimums, because there
15 are a couple of those in play in this case, as well,
16 today. And so, whether it was based on both testimony
17 and oral argument, we would deal with those arguments
18 and testimony first before we go on to, okay, here's the
19 Judge's findings as to the applicable guidelines. And
20 in this context, we will now have separate argument on
21 what the appropriate sentence should be.

22 So, I am assuming by the submissions that I
23 received from all of the parties, that I will start
24 first with the United States, that the testimony of the
25 agent you've suggested, apart from any exhibits, relate

1 in substantial part to some, if not all, of the
2 objections that the Defense has made to the computations
3 under the Guidelines. And so some of that testimony is
4 going to relate to -- in addition to argument, there
5 will be testimony on the issue of responding to some of
6 these objections. Or have I misread the Government's
7 position?

8 MR. RANK: That is correct, Your Honor. The
9 testimony that the Government sought the evidentiary
10 hearing to present is both to address some of the
11 objections to the enhancements in the presentence
12 investigation, and also to give it a more complete
13 picture of the offense and the Defendant.

14 THE COURT: And that is what I assumed coming
15 into the courtroom. Mr. O'Brien -- in other words, how
16 I assumed, if somebody would have asked me based upon
17 all of the submissions, I would have said, well, I
18 assume that we are going to hear any testimony that will
19 relate primarily to the offense and objections,
20 themselves. And then once that is done, any separate
21 oral argument on, well, given what each claims the
22 record is, here is what we believe your ruling should be
23 on these objections and the applicable guidelines.

24 I would then make those rulings after
25 argument and testimony and then we would proceed with

1 any separate argument on a sentence. I also believe
2 that one or more victims will either be speaking from
3 the podium or will be asking the Government to read a
4 statement. But, I am assuming, much like other
5 sentencing proceedings, that is how we are going to
6 proceed today? I will hear from you, Mr. O'Brien? If
7 you are saying, well, no, that is not what I assumed, at
8 all --

9 MR. O'BRIEN: No, Your Honor, it is what I
10 assumed. I anticipated that the Government would call
11 their witness to augment the trial testimony in order to
12 establish the -- or attempt to establish the
13 enhancements that they are recommending in the PSR.

14 THE COURT: Now, do you have any questions or
15 requesting any guidance from the Court? I will note for
16 the record I have received extensive position
17 submissions, both from you and -- maybe now is a good
18 time to -- bear with me just a moment.

19 I will note position and responsive position
20 pleadings from both parties. I will also note, if you
21 will bear with me a moment, the receipt of -- these are
22 not likely to come up at this time, but seven -- well,
23 actually eight letters from seven parties, because Kelly
24 Ardolf sent me two letters. But, from friends, family,
25 the father of Mr. Ardolf. And I won't go through each

1 and every one. But, in addition to that, I received the
2 position papers, extensive, along with the information
3 you dropped off yesterday, including some photographs,
4 family photographs.

5 I am assuming that unless you say otherwise,
6 that it seems like everything has been submitted, both
7 the two-page submission, the statement by Mr. Ardolf and
8 your extensive submission with the letters that have
9 come in throughout the case. But, I had them all in one
10 spot.

11 I assume that unless you ask me for guidance
12 on -- or Mr. Ardolf does, on the scope of your
13 representation today, that we are kind of set to
14 proceed, until you tell me otherwise?

15 MR. O'BRIEN: Your Honor, I did submit that
16 information on behalf of Mr. Ardolf as standby counsel.
17 And we will not be presenting any further evidence. I
18 did want to clarify, the Court did receive the letter
19 from Mr. Ardolf's son Taylor, correct? I noted it in
20 my position paper --

21 THE COURT: I did. I have a letter from -- I
22 singled out Kelly, the youngest daughter, just because I
23 received two letters from her, not at the same time.
24 And then I have Taylor's letter, as well. Well, I will
25 just briefly read through them so both the Government

1 and the Defense believe that, well, so if you are
2 saying, well, we assumed you had something more than
3 that.

4 I have someone who has described themselves
5 as a friend of 11 years, attended school together. I
6 have two letters from Kelly Ardolf. I have Taylor
7 Ardolf's letter, Matthew Chapman who describes being a
8 good friend since the third grade of Mr. Ardolf, and a
9 friend of his deceased wife, I believe, who -- that is
10 going to come up today. Because as emotional as it is
11 for Mr. Ardolf and others, I believe, with the tragic
12 and untimely death, and I think if my memory serves me
13 correct, November 6th of 2000, I believe. And so --
14 because they discussed both Mr. Ardolf and the mother of
15 his children.

16 From his father, Robert Ardolf, I received a
17 letter. A letter from Elizabeth Henderson. A letter
18 from his brother, I am probably mispronouncing the name,
19 Blaze Ardolf. I am not implying at all they just came
20 in recently. Some of these may have come in some time
21 ago.

22 Those are the letters that I have received.
23 So, either -- and I am not talking now about any victim
24 impact statements, because anything I have seen, you
25 have seen. Nothing has come to me confidentially,

1 because as you all know, that is not the way the system
2 works. So, if one or both of you are saying, well, then
3 there are some other letters he has either missed or we
4 thought he had he doesn't have, and I have had extensive
5 contact with the probation officer. So, if she is
6 thinking, I have got a letter that the Judge doesn't
7 have, and she is shaking her head no, but is there other
8 information that you, other than the photographs that I
9 received, that you -- and of course, I haven't built in
10 here, I have numerous correspondence, many of the
11 letters e-filed with Mr. Ardolf over the history of the
12 case. I haven't included his statement or his letters
13 to me over the course of time and whatever I have,
14 everybody else has. Because there is nothing I have in
15 a secret file or anywhere else that has been sealed.
16 So, if I have it, you have it, they have it.

17 Some of those -- just like a presentence
18 report, not unique to this case, they are not public in
19 any case. Sometimes I think they should be. Probation
20 officers panic when they hear me say that, so people
21 could see all of the work that goes into a file by the
22 Probation Department. But, those are the letters that I
23 have and submissions. And so, apart from the position
24 pleadings of both yourself and the Government. So, if
25 you are thinking that, well, there are other letters

1 that we thought you had and you don't have, then I don't
2 know if you want to ask Mr. Ardolf if that seems to
3 cover everything.

4 THE DEFENDANT: It is covered.

5 MR. O'BRIEN: We are satisfied that the Court
6 has received everything that it should have. Thank you.

7 THE COURT: Somebody has their hand up back
8 there, Mr. O'Brien?

9 FEMALE VOICE: You didn't mention my name and
10 sending in a letter, but I also sent a letter in?

11 THE COURT: And your last name is?

12 FEMALE VOICE: I don't want to say. I am
13 Barry's sister.

14 THE COURT: Oh, I received your letter. I
15 do -- yes, I do have your letter.

16 FEMALE VOICE: Thank you. You didn't say my
17 name out loud.

18 THE COURT: Yeah, that is fair enough. And
19 actually, the reason I asked that question, to be candid
20 is, if I didn't, I am sure some of you didn't miss it
21 when I said there is another -- I thought, actually, and
22 now that you say it, I do have that. But, there is the
23 letter that I couldn't read the writing, even though it
24 is better than my handwriting, when I referred to the
25 first letter as a friend of eleven years who attended

1 school together, I wanted to make -- I wasn't sure, but
2 now that you say that, I do have that letter, as well.

3 FEMALE VOICE: Okay.

4 THE COURT: Mr. Rank, same question I asked
5 Mr. O'Brien?

6 MR. RANK: I am unaware of any additional
7 letters, Your Honor.

8 THE COURT: All right. Mr. O'Brien, if I may
9 ask you, as the Government calls the agent, even though
10 the Rules of Evidence, you know, under Rule 1102 don't
11 apply in all respects to sentencing proceedings so they
12 are, for lack of a better word, they are more relaxed.

13 Do you intend to make any objections with the
14 permission of Mr. Ardolf? Or does he intend to make or
15 want to represent himself? In other words, I have seen
16 it both ways with standby counsel when a witness is
17 called, they request assistance of counsel and have an
18 understanding or they just say the contrary. You are
19 standby, and you are going to say nothing, unless I ask
20 you to. So -- and I see Mr. Rank with a puzzled look on
21 his face.

22 MR. RANK: I do have a puzzled look, Your
23 Honor, and part of this applies to what I understand
24 standby counsel is. I was a little taken aback by the
25 lengthy submissions submitted by Mr. O'Brien in this

1 case because he is not the attorney in this case.

2 And so, I think that if -- and the Court has
3 been addressing Mr. O'Brien. My understanding is Mr.
4 O'Brien is not the attorney of record in this case.

5 THE COURT: That is true.

6 MR. RANK: And the attorney of record is the
7 person who under *Faretta* has a right to represent
8 themselves.

9 THE COURT: That is true.

10 MR. RANK: Until they say I want to be
11 represented by counsel. So my question is, is Mr.
12 O'Brien representing Mr. Ardolf, or is Mr. Ardolf
13 representing himself? And if Mr. Ardolf is representing
14 himself, I think that Mr. Ardolf should be the one that
15 is up here addressing the Court.

16 And the reason I have concern about this,
17 Your Honor, is that when we put on the witness, are
18 there going to be two people --

19 THE COURT: No, there is not going to be. It
20 will either be Mr. O'Brien, and that is why I was going
21 to inquire of Mr. Ardolf, it will either be Mr. Ardolf
22 making any objections and of course that, included
23 within the word objection is his right to say, I want to
24 make an objection, but I want to consult my standby
25 counsel. Or, if Mr. Ardolf makes it clear that he is

1 going to request for the limited purpose of this
2 question that unless he otherwise, one of them is going
3 to be doing the -- it won't be both. So, and that would
4 be the same, even if there are two co-counsel, I
5 wouldn't say, well, you are both free to make, in other
6 words, if we had two lawyers there instead of one, it
7 would be the same ruling by the Court. I understand
8 your concern. We will just make it crystal clear on the
9 record, here.

10 MR. RANK: And I guess my other concern, Your
11 Honor, is that what has happened in this case has shown
12 that there will be things said by a person representing
13 Mr. Ardolf who -- and then Mr. Ardolf later claims that
14 that person did something that they weren't supposed to
15 do or did something that he wasn't endorsing. If he is
16 representing himself and speaking on his own behalf,
17 then he can't make that later allegation.

18 THE COURT: Let me ask Mr. O'Brien first,
19 then I will ask Mr. Ardolf. Do you want to respond to
20 that, Mr. O'Brien?

21 MR. O'BRIEN: Sure. With respect to the
22 narrow question of who would object, if at all, to the
23 witness' testimony, I am confident that Mr. Ardolf would
24 like me to do that.

25 I don't anticipate any objections, knowing

1 what the rules are at a sentencing hearing. I do not
2 anticipate Mr. Ardolf making any objections to the
3 testimony today.

4 As far as the bigger issue, Your Honor, for
5 example, the submission, I am trying to be of service to
6 the Court.

7 THE COURT: We will approach -- we will take
8 it step by step. So, Mr. Ardolf, as long as my Court
9 Reporter and everybody else can hear you, you don't have
10 to come to the podium for this limited question, unless
11 you wish to. You have heard what Mr. O'Brien has said
12 and he is standby counsel because you have asserted the
13 right and have the right to represent yourself.

14 He has just said that for the limited purpose
15 of -- and we will just take it one part of the hearing
16 at a time. The limited purpose of the agent taking the
17 stand on issues relating to the objections and the
18 offense, itself, and for lack of a better phrase, the
19 applicability of the guidelines, that you -- if anybody
20 is going to make any objections, you have given him
21 permission to do that. Is that true?

22 THE DEFENDANT: Yes, that's true.

23 THE COURT: All right. I, as you would
24 probably imagine, I am having a difficult time today.
25 And I understand standby counsel is for cases like this.

1 And so I am just confirming that I need to use him.

2 THE COURT: We will take it one step at a
3 time. We will go through the first witness and I will
4 check back in with you. Before we begin on that
5 testimony, I want to ask a question that admittedly does
6 not relate probably even indirectly to that.

7 In the submission, the responsive
8 submission -- this is on the forfeiture issue. In the
9 responsive submission yesterday, the United States
10 Attorney's Office ended their position pleading that was
11 e-filed, so it is out there for the world to see. The
12 Government proposed an alternative to forfeiture, which
13 was conveyed to Defendant's standby counsel. Because of
14 the Government's overriding goal, the removal of the
15 Defendant from the Xxxxxx Xxxxxxx neighborhood in Blaine,
16 Minnesota to provide safety for the victims, to that
17 end, we have offered to allow the Defendant to sell his
18 house and put all of the money in trust for his
19 children.

20 In other words, that is telling me if I agree
21 with it, they will walk away. The Government's offer
22 was communicated to the Defendant, and he has apparently
23 rejected it.

24 Do we know what the status of this is today?
25 Because I have been a Judge for 27 plus years, and 13

1 here, and these -- the Government rarely is willing to
2 do such a thing. I would approve it if it is set out
3 there. And I was also going to say that to me it is
4 kind of a non-issue on -- without getting into some of
5 the mail correspondence between the jail and children
6 and such, that we can easily preserve, if there is an
7 issue of invaluable family pictures on some of these
8 computers that were seized, we can easily preserve, I
9 would think, some of that; and that would rarely, if
10 ever, be a defense to a forfeiture claim.

11 What is the status of that, if we know? And
12 I am not saying we need to know to take the agent's
13 testimony, but I thought, well, is that an issue we are
14 going to be discussing before the hearing is over?
15 Because I read that offer by the Government.

16 In other words, so the record is clear, Mr.
17 Ardolf is in one of those unique positions, apart from
18 being here in trial, he is probably one of -- I don't
19 know what the statistics are, a handful of people own
20 their house free and clear.

21 And so, for the Government to say, we will
22 walk away, in effect, if he wants to sell his house,
23 apart from whatever the sentence is and put the money in
24 trust for his children, we will walk away. Did I read
25 it correctly?

1 MR. RANK: Yes, Your Honor. By way of
2 background, it wasn't just -- that wasn't the first time
3 this offer was made to the Defendant. Immediately after
4 the trial in this matter and the guilty pleas, I
5 contacted Mr. Ardolf's lawyer at the time and
6 communicated to him the same offer.

7 As the Court is aware, the law is clear that
8 in a child pornography distribution offense if you use
9 your house to facilitate the offense, the standard is
10 very strong, the law is very strong that that house is
11 forfeitable as an instrumentality of the offense.

12 So, we contacted Mr. Ardolf's counsel at the
13 time, showed him the case law on it and said: Look, if
14 you make efforts now to place -- to sell the house and
15 place the proceeds of the house in a trust for the
16 benefit of the kids, not a trust that Mr. Ardolf has
17 control over, has the ability to get at for the
18 remainder, but if it is put in trust for the benefit of
19 all three of the Ardolf children, that we will walk away
20 from our rights under forfeiture with respect to the
21 house. And we did that back in December of last year.

22 That was communicated, and Mr. Ardolf
23 rejected that offer at the time, perhaps because he
24 thought he was going to move to withdraw his guilty
25 plea. But, we then filed the paperwork, filed the

1 motions with respect to forfeiture, laid out the case
2 law and contacted Mr. O'Brien, made the same offer, and
3 at that point we did not get a positive response from
4 that.

5 Our position today, Your Honor, what we plan
6 on seeking from the Court today is a final order of
7 forfeiture on both the computer equipment and the house.
8 And with that order of forfeiture, we don't have to
9 execute on that order of forfeiture. We can have the
10 ability, even after that order of forfeiture is entered,
11 to still work with counsel for the Defendant in this
12 case to reach the same result, which is to place the
13 proceeds of the house, sell the house relatively
14 quickly, and also to place the proceeds of that house in
15 a trust for the benefit of the kids.

16 So, yes, it was communicated to the Defendant
17 back last December.

18 THE COURT: I wasn't aware of that in
19 December, not that I claim I should have been. I just
20 read that today and I thought I would check in before we
21 began the formal part of the hearing. So --

22 MR. RANK: That is accurate, Your Honor.

23 THE COURT: I didn't want to spend a lot of
24 time at this stage, Mr. O'Brien, on it because we will
25 be revisit this. I won't be cutting anybody off on that

1 issue. Whether you want to respond or Mr. Ardolf, I saw
2 he -- I wasn't eavesdropping, but I saw him lean over
3 and you wrote something down. But --

4 MR. O'BRIEN: Well, Your Honor, I appreciate
5 the Government's offer, and I am going to continue to
6 discuss that with Mr. Ardolf, and I have spoken with Mr.
7 Ardolf's son, as well about it.

8 THE COURT: I won't go into it now, and I
9 probably won't even go into it in any great -- we will
10 address the forfeiture issue, at least agree on what the
11 status of it is before this hearing is over, even if it
12 is after the sentencing.

13 And I won't go into it now, and maybe
14 sometimes the Judge doesn't have to be privy to
15 everything. But, if one of the objections -- and I
16 don't need to know now, because we will go on and start
17 with the testimony, is the oldest daughter, given how I
18 read the file and the relationship of the family, as sad
19 as that may be to me, we will check in, because I
20 probably will find out that has all been discussed
21 between the parties.

22 And I think as Mr. Rank says, that not unique
23 to this case, either something has a right to be subject
24 to forfeiture or not. And if it is, it still doesn't
25 mean the issue can't get resolved in some way that might

1 serve the interests of all parties. So, we will come
2 back to that, because it is entirely unrelated to really
3 the rest of the issues before me today. So -- all
4 right?

5 MR. O'BRIEN: I understand.

6 THE COURT: You may proceed Mr. Rank?

7 MR. RANK: Thank you, Your Honor. Your
8 Honor, the United States is going to call Special Agent
9 Robert Cameron at this point. And before I do that, I
10 wanted to address some of the issues of the exhibits
11 that have already been entered into evidence in this
12 case.

13 THE COURT: And by entered into evidence, you
14 mean as part of the Court's file or at the trial of the
15 matter before the plea?

16 MR. RANK: Primarily, Your Honor, that were
17 entered at the trial --

18 THE COURT: At the trial, itself.

19 MR. RANK: I believe I just want to for the
20 record, the exhibits that have already been admitted by
21 the Court are Exhibits 1 -- Your Honor, do you have a
22 copy of the trial exhibit list?

23 THE COURT: I do, well I probably do, but if
24 you have an extra copy, other than to go through this,
25 since I have a --

1 MR. RANK: And I have also got one for the
2 Defense.

3 THE COURT: Thank you.

4 MR. RANK: And in fact, this is also helpful.
5 I made a copy for the Court's benefit of our checklist
6 of that which was admitted.

7 THE COURT: Thank you.

8 MR. RANK: And based on my notes, what is
9 already in is Exhibit 1, 2, 5, 11, 20, 22, 32 through
10 37.

11 THE COURT: And maybe what we should do, even
12 though it will take just a bit more time, you don't have
13 to literally read -- but for the record, just maybe
14 identify the exhibit. In other words, they are
15 identified in some detail in the Government's exhibit
16 list that existed at the time of trial. So, the record
17 will speak for itself. So, if you can kind of identify
18 as you go down each one which means we should step back
19 to one and just describe it so there is a general
20 understanding of what they are?

21 MR. RANK: I will do that. And there were
22 some broad categories that I can summarize, too, when I
23 get into those.

24 Exhibit 1 was the February 22nd, 2009 e-mail
25 from the Yahoo.com account to a Moss & Barnett employee.

1 Exhibit 2 is -- that was to Brenda Murphy.

2 Exhibit 2 was a February 22nd, 2009 e-mail
3 from that same Yahoo.com account to Philip Young at Moss
4 & Barnett.

5 Exhibit 5 was a February 22nd, 2009, e-mail
6 from the Yahoo.com account to Dave Senger with the two
7 attachments of child pornography.

8 Exhibit 11 is a printout of an e-mail from an
9 internal employee at Moss & Barnett, noting that the
10 e-mails, those series of three e-mails identified in 1,
11 2 and 5 had come in on February 22nd, 2009.

12 Exhibit 20 is a printout of the MySpace page,
13 the fake MySpace page created by the Defendant
14 containing child pornography that was printed by Anoka
15 County Sheriff's Detective Pat O'Hara.

16 Exhibit 22 is a large printout of the child
17 pornography image that was contained on the MySpace
18 page.

19 Exhibit 32 is a March 8th e-mail from another
20 gmail account, a fake gmail account created in the name
21 of Victim B from the indictment, Your Honor, to Joe
22 Maternowski Anthony Dorland at Moss & Barnett. And then
23 there are a series of e-mails from 33 through 36, which
24 are internal e-mails at Moss & Barnett related to that
25 e-mail.

1 Exhibit 37 is a printout of a text file found
2 on the thumb drive seized from Barry Ardolf's bedroom
3 during the July 21, 2009 search warrant containing a
4 number of identifying -- information related to the
5 creation of that fake gmail account.

6 Exhibit 40 is a map showing where the two
7 routers that Barry Ardolf used to connect to gmail to
8 create that second gmail account was located.

9 41, 42 and 43 are all related to the April
10 1st, 2009 and May 6, 2009 e-mail from the fake Yahoo.com
11 account created by Barry Ardolf to the various public
12 officials, including Vice-President of the United
13 States.

14 THE COURT: Three of those are identified as
15 to the White House, correct?

16 MR. RANK: Pardon me?

17 THE COURT: To the White House?

18 MR. RANK: Yes, sir, WhiteHouse.gov.

19 Exhibit 81, Your Honor, which is also
20 admitted, is a stipulation of the parties that the image
21 contained in the e-mail sent to Dave Senger and the
22 MySpace page, and it also was found on a number of
23 computers belonging to Barry Ardolf was in fact child
24 pornography, and represented real children.

25 Exhibits 96 through 121 are photographs taken

1 during the search warrant, a map and some photographs
2 taken during the search warrant at Barry Ardolf's
3 residence on July 21, 2009.

4 Exhibits 123 through 141 are items seized
5 during the search of the Ardolf residence on July 21,
6 2009, as are Exhibits 133 and 144, and 148, Your Honor.

7 And lastly, Exhibits 152 and 153 are
8 custodian of record documents related to the creation of
9 a MySpace page and the creation of the gmail accounts.

10 THE COURT: And just so the record is clear,
11 what you have gone over, and it is consistent with my
12 notes here, the exhibits that were received the first
13 approximately three days of trial?

14 MR. RANK: That is correct, Your Honor. As
15 Your Honor is aware, I refer to some of those exhibits
16 in the position pleadings --

17 THE COURT: That is true.

18 MR. RANK: -- of the Government and I believe
19 that they also were relied on in part by the Probation
20 Office in coming up with the factual basis for the PSR.

21 THE COURT: That is also true. And I could
22 just state, to the extent it is relevant, not unusual
23 for that as the lawyers in the room are aware of,
24 regardless of how the trial ended, whether it ended with
25 a verdict or a plea to reference back that as part of

1 the record. So --

2 MR. RANK: Thank you, Your Honor. The United
3 States calls Special Agent Robert Cameron.

4 THE COURT: If you would step forward, sir?
5 And then before you step into the witness box, I will
6 give the oath to you. If you would please raise your
7 right hand?

8 (Witness sworn.)

9 THE COURT: Then there is a step up there.
10 But, if you would have a seat behind the microphone and
11 once you are seated, if you would -- and you have to sit
12 fairly close to the mike and make sure that little green
13 light is on, otherwise it won't pick you up. If you
14 would please state your full name and spell your last
15 name?

16 THE WITNESS: Robert Cameron, C-a-m-e-r-o-n.

17 THE COURT: You may inquire, Mr. Rank.

18 MR. RANK: Thank you, Your Honor. Your
19 Honor, I am going to make an offer as to a number of
20 exhibits that I will be referring to throughout. They
21 are all identified in the exhibit list. Copies have
22 been provided to the Court and the Defense before, and
23 they are all listed in detail on the exhibit list I just
24 provided to the Court.

25 I will go, as I am bringing them up, rather

1 than offer and get them in, I want to do a mass offering
2 of the exhibits and refer to them during the course of
3 the testimony of Agent Cameron for efficiency sake. So,
4 I will -- as they come up, as we are discussing them
5 during the course of his testimony, they will obviously
6 be identified. I would like to offer them all at once.

7 THE COURT: All right.

8 MR. RANK: And I would like to offer, Your
9 Honor, the following exhibits. Exhibits 3, 4, 6 through
10 10, 12 through 19, 21, 23 through 30, 37, 44, 45, 50
11 through 69, 73 through 80, 85 through 91, and 154 and
12 155.

13 Your Honor, in addition to those exhibits
14 which were all previously disclosed to the Court and
15 Defense Counsel and appear on the exhibit list that
16 we've submitted back during the trial, I have four
17 additional exhibits at this time and I would offer
18 those, as well.

19 They are all letters written by Mr. Ardolf
20 from jail and have been referenced in the submissions by
21 the Government, both in the position pleading and then
22 to a lesser extent in the response to Defense's position
23 pleading.

24 I would offer those at this time. I have
25 copies of each one of those for Defense Counsel, as

1 well, Your Honor, 160, 161, 162, 163. And I also have
2 copies of each of those exhibits for the Court.

3 THE COURT: All right. My suggestion, Mr.
4 Ardolf and Mr. O'Brien is that without having to be
5 concerned about the word waiver, if there is some
6 objection, is to move through this, but address that
7 concern that the defense may have, is to provisionally
8 receive them under Rule 104. And I say provisionally
9 for the limited purpose of allowing the testimony to
10 proceed.

11 And then when all is said and done after
12 any -- with or without any objection, after the direct,
13 with or without any cross, if the Defense then, with or
14 without objection wants to say, well, in light of the
15 testimony and how the exhibits were utilized, here is
16 our objection. You won't get the "W" word waiver out of
17 my mouth. I will rule up or down. Is that acceptable?

18 Do you want to mention it -- if you need a
19 moment to explain that to Mr. Ardolf?

20 (Discussion off the record between Mr.
21 O'Brien and the Defendant.)

22 MR. O'BRIEN: We have no problem with doing
23 that.

24 THE COURT: And I will check in with both
25 you and Mr. Ardolf at the end of the examination.

1 I will indicate for the record that even if
2 -- and I think in a private conversation Mr. Ardolf and
3 Mr. O'Brien would probably confirm this, that there is
4 nothing unusual about offering actually with or without
5 a testimonial sponsor, sometimes we call it, a number of
6 these exhibits.

7 Some would suggest that if they are somewhere
8 in the Court's file, even if they weren't admitted
9 during the trial, that they are part of the record.
10 But, just to make -- in fairness to everyone, so
11 everything is out in the open, these have all been
12 identified.

13 So, if I proceed in that way and I
14 provisionally receive them as I defined that, is there
15 any objection from the Government?

16 MR. RANK: No, Your Honor.

17 (Government's Exhibits 3, 4, 6, 7, 8, 9, 10,
18 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 23, 24, 25, 26,
19 27, 28, 29, 30, 37, 44, 45, 50, 51, 52, 53, 54, 55, 56,
20 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 73,
21 74, 75, 76, 77, 78, 79, 80, 85, 86, 87, 88, 89, 90, 91,
22 154, 155, 160, 161, 162 and 163 were provisionally
23 received into evidence.)

24 THE COURT: You may inquire.

25 MR. RANK: Thank you, Your Honor.

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ROBERT CAMERON

DIRECT EXAMINATION

BY MR. RANK:

Q. Good morning, Agent Cameron.

A. Good morning.

Q. Agent Cameron, where do you work?

A. I work Downtown Minneapolis with the FBI.

Q. And could you describe in general what you do
for the FBI?

A. I am a special agent with the Minnesota Cyber
Crimes Task Force.

Q. How long have you been with the FBI?

A. Nine years and two days.

Q. How long have you been specializing in cyber
crime investigations?

A. The entire time.

Q. You indicated that you were assigned to the
Cyber Squad, is that correct?

A. That is correct.

Q. Generally, do you need specialized training
to be assigned to that squad?

A. Yes, you do.

Q. Did you have some background that brought you
into the cyber investigations?

A. Yes.

1 Q. What was that?

2 A. I was a network engineer with a national
3 security agency, with Purcell and Hamilton, prior to
4 joining the Bureau.

5 Q. And did you have some specialized education
6 besides your employment?

7 A. Absolutely, numerous trainings and
8 certifications, and incident response, forensics, things
9 of that nature.

10 Q. Okay. Within the Cyber Squad do certain
11 people have different specialties even within the Cyber
12 Squad at FBI?

13 A. Absolutely.

14 Q. And what is your area of specialty?

15 A. Computer intrusions.

16 Q. What, in general, does that mean, computer
17 intrusions?

18 A. I guess in popular nomenclature, it is
19 hacking into computers and things of that nature.

20 Q. And is that what you have been doing for most
21 of the time you have been working as a Special Agent is
22 focusing in that level of investigation?

23 A. The entire time.

24 Q. As part of your duties with the FBI, Agent
25 Cameron, were you involved in the search of Barry

1 Ardolf's residence on July 21, 2009?

2 A. Yes, I was.

3 Q. Were you the case agent assigned to the
4 investigation that resulted in that search warrant?

5 A. Yes.

6 Q. Can you describe very generally what led you
7 to obtaining a search warrant to search Barry Ardolf's
8 residence?

9 A. Well, the case was brought to me through Bob
10 Blackmore, an agent on our squad who works child
11 pornography cases. He had been working with the Anoka
12 County Sheriff's Department on an unusual case that also
13 involved threats to the President. And once they
14 determined that there might be a computer intrusion
15 aspect, they brought it to my desk.

16 Q. Was there originally a child pornography
17 investigation?

18 A. Absolutely.

19 Q. And that is how it was originally brought
20 into the FBI?

21 A. Yes.

22 Q. That is what Special Agent Cameron
23 specializes in is child pornography investigations?

24 A. Blackmore.

25 Q. I'm sorry, Bob Blackmore.

1 A. Right. That is his speciality, child
2 pornography.

3 Q. And also at some point in time the Secret
4 Service became involved because there was a threat to
5 the Vice-President?

6 A. Yes.

7 Q. You eventually obtained a search warrant to
8 search Mr. Ardolf's residence?

9 A. Yes.

10 Q. You were the affiant on that warrant?

11 A. Yes.

12 Q. Were you present during the execution of the
13 search warrant?

14 A. Yes, I was.

15 Q. In general, can you describe what happened
16 when you went into the house to execute the search
17 warrant?

18 A. Well, Mr. Ardolf was identified outside of
19 the home, so some agents met with him. He let us into
20 the home. We cleared the house for safety reasons, and
21 then I proceeded to interview Mr. Ardolf and the search
22 was conducted.

23 Q. Let me ask you a little bit about the
24 interview in a moment. But, in terms of the search,
25 were there a number of agents involved in the search?

1 A. Absolutely.

2 Q. And before going in there, was the search
3 being conducted to determine whether Mr. Ardolf had
4 engaged in some computer hacking activities?

5 A. Yes.

6 Q. Were you looking for computer equipment?

7 A. Yes.

8 Q. Did you find computer equipment?

9 A. Yes, we did.

10 Q. How much?

11 A. I would say over 15 computers, over 40, 50
12 hard drives. We found a lot of computers.

13 Q. For a residential search warrant, was that on
14 the extreme high end of the number of computers that you
15 found doing a residential search?

16 A. Yes, it is very rare to find that many
17 computers in a single residence.

18 Q. I will ask you a little more about what you
19 found in a moment, but you also indicated that you
20 interviewed Mr. Ardolf at that time; is that correct?

21 A. Yes.

22 Q. And when you interviewed him did you ask him
23 some questions about his purpose of your search?

24 A. Absolutely. He asked, you know, why we were
25 there and things of that nature.

1 Q. During the course of the interview was he
2 truthful with you?

3 A. I don't believe he was.

4 Q. In fact, did you ask him whether he has any
5 knowledge of wireless networks, for example?

6 A. Right. I asked him, for instance, if he knew
7 the difference between WEP encryption and WPA
8 encryption.

9 Q. Did you also ask him if he knew what
10 BackTrack software was?

11 A. Yes, I asked him if he knew what it was or
12 had ever used it.

13 Q. And why is that significant?

14 A. There is software on BackTrack that can be
15 used to crack wireless networks.

16 Q. And why, in particular, were you asking Mr.
17 Ardolf about it during the search on July 21st, 2009?

18 A. There were several CDs at the house that had
19 BT3 on it and things of that nature, which is BackTrack
20 3.

21 Q. That is significant because that is the
22 software that you were talking about, the hacking
23 software?

24 A. Absolutely.

25 Q. You talked about the large number of

1 computers and other electronic media that was seized
2 during the course of the search warrant. Is that the
3 photos and other items that Special Agent Howe talked
4 about during the course of trial?

5 A. Right, we took numerous photos of all of the
6 computers and most of the things were seized.

7 Q. And in addition to searching on the scene,
8 were there some off-site searching or analysis that took
9 place?

10 A. Yes, we did forensic analysis of things that
11 are seized.

12 Q. Can you describe in general what kind of
13 analysis you did on the computers and electronic media
14 in this case?

15 A. Right. Well, we take the hard drive, image
16 the hard drive and upload it to a Forensic Toolkit which
17 is a forensic tool we use to analyze everything that is
18 on that drive and the items on the machine, on the
19 machine around there, any speed drive, or whatever it
20 is.

21 Q. And some of the things you took from the
22 Ardolf residence, one was a very large thumb drive, is
23 that correct?

24 A. Correct.

25 Q. 32 GB thumb drive?

1 A. Yes.

2 Q. And then were there also, in addition --
3 where was that found?

4 A. In his bedroom.

5 Q. In addition to the thumb drive found in his
6 bedroom, did he also have several other computers in his
7 bedroom?

8 A. Yes.

9 Q. Did you find in review of those computers
10 items of evidentiary significance as you were going
11 through them?

12 A. Yes, I did.

13 Q. I am going to ask you -- you talked a little
14 bit about -- if I could get the screen up, Your Honor?
15 I am going to show, this is Exhibit 123.

16 THE COURT: Can you activate it?

17 THE CLERK: Uh-huh.

18 THE COURT: Yeah, we will have it up here in
19 a moment. It takes just a moment for that projector to
20 warm up and turn on, but it should be just momentary.

21 It may be on the screen.

22 MR. RANK: It is starting to show up there,
23 Your Honor.

24 (Discussion off the record.)

25 BY MR. RANK:

1 Q. Actually, before we get to this exhibit, can
2 you see on the screen, Agent Cameron, this is
3 Exhibit 121 admitted at trial.

4 Your Honor, I don't know if you can adjust
5 the lights at all?

6 THE COURT: I can, and --

7 MR. RANK: Thank you, Your Honor.

8 BY MR. RANK:

9 Q. There were a lot of CDs and DVDs that you see
10 from the Ardolf residence, correct?

11 A. Yes.

12 Q. I am showing you -- this is -- what are we
13 looking at right here in Exhibit 121?

14 A. It is just a number of CDs. Some are backups
15 of operating systems, some are security software, some
16 are --

17 Q. Without going into detail --

18 A. I'm not exactly sure what all of them are. I
19 can see we did look through them and found the ones that
20 we thought were pertinent.

21 Q. And I was going to ask you. You found some
22 over his bedroom closet door, is that right?

23 A. Yeah, that was his bedroom closet.

24 Q. Did you find other CDs and DVDs throughout
25 the house?

1 A. Yes.

2 Q. Hundreds?

3 A. Hundreds.

4 Q. Maybe thousands?

5 A. Maybe. Yes, there was a lot.

6 Q. Did you in fact have the opportunity to go
7 through each one of them?

8 A. I didn't go through every single one, no.

9 Q. Did you go through a great number of them?

10 A. Yes, I did.

11 Q. To look to see what was on there?

12 A. Right.

13 Q. When you were going through there, did you
14 find a number of instances of what is shown in
15 Exhibit 123?

16 A. Yes.

17 Q. What was -- there is a label on the bottom of
18 that. What was on 123?

19 A. That is BackTrack.

20 Q. And BackTrack is what, if you could describe
21 a little bit more about what BackTrack is?

22 A. BackTrack is an operating system. So, you
23 basically boot your computer to this CD, and it is a
24 self-contained operating system.

25 Q. And it is for what purpose?

1 A. The purpose of BackTrack, it is used for
2 penetration testing. It can be used to test wireless
3 networks. It can be used to crack wireless networks.
4 It can be used to enumerate networks. It can be used
5 for a lot of reasons.

6 Q. Did you find more than one version of
7 BackTrack during the search of Barry Ardolf's residence?

8 A. Yeah. There was a BackTrack Beta, which was
9 pretty old, several BackTrack 3s and BackTrack 4, which
10 was relatively new at that time.

11 Q. Now I guess we can go through Exhibit 124, it
12 is another CD with hacking-related software on it, is
13 that correct?

14 A. Yes, it is.

15 Q. 125, also hacking related software programs?

16 A. Yes.

17 Q. Agent Cameron you know this because you went
18 through each one of these CDs or DVDs, is that right?

19 A. Yeah, each of these CDs I went through and
20 tested and looked through all of them to see that the
21 content was operable and that it worked and everything
22 else.

23 Q. Same for 126, right?

24 A. Right.

25 Q. 127?

1 A. Yes.

2 Q. Hacking software programs?

3 A. Right.

4 Q. 128, and that is also the initials BT, that
5 is the BackTrack software?

6 A. Yes, it is.

7 Q. 129, actually it is spelled out, BackTrack?

8 A. Yes.

9 Q. 130 is another version of BackTrack?

10 A. Yes.

11 Q. 131, another version of BackTrack?

12 A. Another one.

13 Q. And 132, 133?

14 A. Yeah, I guess it is 2006. It looks like
15 BackTrack Beta was out.

16 Q. I think I am doing the last one, 134. So, as
17 we have gone through, multiple CDs containing
18 hacking-related software; is that correct?

19 A. That is right.

20 Q. During your interview with Mr. Ardolf did you
21 ask him whether he had ever used BackTrack?

22 A. Yes, I did.

23 Q. What did he say?

24 A. He said no, he had not used it.

25 Q. Did you find during the course of your

1 forensic examination that indicated otherwise?

2 A. Yes, I did.

3 Q. One of the things that you found were some
4 manuals, is that correct?

5 A. Yes.

6 Q. And you found some manuals, electronic
7 versions of manuals for using BackTrack on the thumb
8 drive that was recovered from Mr. Ardolf's residence, is
9 that right?

10 A. Correct.

11 Q. Did you find those manuals anywhere else?

12 A. Yes. We also found them at Medtronic.

13 Q. Why is that significant that you found those
14 items at Medtronic?

15 A. Well --

16 Q. Is that where Barry Ardolf worked?

17 A. Yes, that is where Barry Ardolf worked; that
18 is correct.

19 Q. Sot, it was his workspace at Medtronic; is
20 that correct?

21 A. Yes.

22 Q. I am going to show you Exhibit 58, which
23 is -- I think I will show you 60 because I think it is
24 turned in the correct way. No. There we are.

25 What are we looking at on the screen, Agent

1 Cameron?

2 A. This is the manual entitled, "Cracking WEP
3 using BackTrack, a Beginner's Guide."

4 Q. And where was this found?

5 A. This was at his office.

6 Q. And were there a series of manuals for these
7 BackTrack found at the office at Medtronic, more than
8 one?

9 A. Right. There was at least a few, all dealing
10 with cracking WEP.

11 Q. And I am going to show Exhibit 61. And 61 is
12 the electronic version of that same manual that was
13 found in his workspace at Medtronic, is that correct?

14 A. That is correct.

15 Q. And I will blow it up. If we turn to the
16 first page, does this represent the first page of that
17 manual?

18 A. Yes, it does.

19 Q. And what is it that is shown on here?

20 A. It is showing how to -- well, it is showing
21 how he is using -- or you used Kismet to enumerate
22 wireless networks. And then it shows how to use
23 Aircrack and Aireplay to crack WEP encryption.

24 Q. Let me just focus on the top portion.
25 Hopefully, this blows up well.

1 Can you read the text starting off with,
2 "This tutorial?"

3 A. "This tutorial is intended for users with
4 little or no experience with Linux or WiFi. The folks
5 over at Remote Exploit have released BackTrack, a tool
6 which makes it ridiculously easy to access any network
7 secured by WEP encryption. This tutorial aims to guide
8 you through the process of using it effectively."

9 Q. And then if we go down to the tools overview
10 portion, kind of describe to the Court what is shown in
11 the tools overview.

12 A. First is Kismet. Basically, that is a
13 wireless networking tool. You can see, capture packets
14 and see all of the wireless networks that are operating
15 in your vicinity and determine if they have encryption
16 or not.

17 There is air monitoring, airmon-ng that
18 basically puts your wireless card into monitor mode,
19 which is required to perform this operation. Airodump
20 is a packet capture tool. It captures all of the
21 packets that come off a wireless network. Aireplay is a
22 tool to replay certain packets to the intended target of
23 the web attack, and Aircrack takes those, the packets
24 captured with Airmon and cracks the algorithm.

25 Q. Now, from that overview, I will ask you a

1 little bit about some of the evidence that you found.
2 You did a forensic reexamination of some of the
3 electronic storage devices seized from Barry Ardolf's
4 residence, is that correct?

5 A. Yes, I did.

6 Q. Did you find evidence when you were reviewing
7 that that Barry Ardolf had in fact used BackTrack and
8 the software that is on there, BackTrack, to access the
9 wireless router of the victims in this case?

10 A. Yes, I did.

11 Q. What, in particular, did you find?

12 A. I found numerous screen shots of BackTrack on
13 the machines. I also found cut and pasted copies and
14 flat text files of the cracked WEP key for the victim's
15 router. And several notes regarding how to use Aircrack
16 and Aireplay, that identified the MAC address and
17 machine address of the victim's wireless router.

18 Q. I am going to show you Exhibit 54, and this
19 is from a page into it, but did you find some
20 photographs, digital photographs of a computer screen
21 showing BackTrack running on a thumb drive that was
22 recovered from Barry Ardolf's residence?

23 A. Yes, I did.

24 Q. All right. Let me go through to get to one
25 of the first screens on there. What is showing up on

1 this screen right now, Agent Cameron?

2 A. That is Kismet on the left.

3 Q. That is this right here?

4 A. It is actually the top and the bottom of that
5 are both Kismet there.

6 Q. And so, in fact, Agent Cameron, this is a
7 digital photograph of a computer screen; is that
8 correct?

9 A. That is correct.

10 Q. Did you do some analysis of the file that
11 was -- that this digital photograph came from to
12 determine what camera took it?

13 A. Right. We looked at the metadata and
14 identified the camera that took that photo.

15 Q. Did it turn out to be an Olympus camera of
16 the same make and model as the one that was seized from
17 Barry Ardolf's bedroom?

18 A. Yes.

19 Q. In general, could you describe what is shown
20 on the screen?

21 A. Well, it looks -- actually, I'm sorry, Kismet
22 is on the bottom and up at the top it has got some shell
23 thing going. The Kismet portion, it is enumerating the
24 networks, and it shows there is a packet column, where
25 he is showing how many packets he is collecting from the

1 specific as access points that would be in the vicinity.

2 Q. Is this something that would need to be done
3 in order to crack into somebody's wireless router?

4 A. Right. You need to identify the network and
5 determine if it is encrypted, determine the strength of
6 that network, things of that nature.

7 Q. And this is running as part of that software
8 package that is available on BackTrack, is that correct?

9 A. Correct.

10 Q. And then what is showing on the upper
11 left-hand -- or the upper portion of the screen?

12 A. Well, on the left there is all of the MAC
13 addresses of the wireless networks, and it is showing
14 the encryption along those wireless networks.

15 Q. And MAC address is what?

16 A. It is a machine address. It is basically --
17 it is how you uniquely identify an access point.

18 Q. So, if someone is running this, they can tell
19 all of the wireless routers that are operating in and
20 around their neighborhood?

21 A. Right.

22 Q. And so when you talk about encryption levels,
23 going up to the top and blowing up a portion up at the
24 top, the column under the letters ENC, does that
25 represent encryption levels?

1 A. Yes, it does.

2 Q. So, by running that particular computer
3 program, you can determine what the level of encryption
4 the different routers were running, is that right?

5 A. Correct.

6 Q. So, you can see on there, WPA, WEP, WPA2, is
7 that also correct?

8 A. Yes.

9 Q. That will be necessary to operate -- running
10 that would be necessary to find a router to be able to
11 hack into it; is that correct?

12 A. Right, you need to identify it first.

13 Q. So, I will then blow up the right-hand
14 portion of the screen. What does that show?

15 A. This is showing someone trying to
16 authenticate to a wireless network on the top.

17 Q. What is the purpose of that?

18 A. Well, to utilize that router, you would have
19 to authenticate to that router.

20 Q. So, in terms of -- I want to ask you
21 specifically about hacking into the victims' wireless
22 router. You found evidence that in fact Mr. Ardolf had
23 done that?

24 A. Right.

25 Q. You talked about that a little bit earlier.

1 In terms of the process of cracking someone's
2 encryption, what steps are required to take it, and
3 what, in particular, is being shown on here in terms of
4 the steps?

5 A. Well, as we discussed, you need to enumerate
6 the network, first. Then you need to get your packet
7 capture going. So, you collect all of the packets from
8 that specific network. You need to authenticate to that
9 machine. Wait, let me take a step back.

10 First you capture the packets, and you need
11 it for WEP, to defeat WEP, you need to capture ARP
12 packets, specifically ARP packets that contain an
13 initialization vector. They are called IVs. So, you
14 need to collect these ARP IV packets.

15 Once you collect one using the air
16 monitoring, you take that packet and replay it with
17 Aireplay against the victim router, or the subject
18 router. And that creates more IVs. And all of the time
19 you are capturing all of those packets, all of those IV
20 packets. Once you have like 300 to 500,000 of them, you
21 put them into Aircrack and it cracks the algorithm.

22 Q. Now, I am going to try to interpret that into
23 a simpler terminology. The first thing you need to do
24 is identify the router that you want to crack, is that
25 right?

1 A. Right.

2 Q. And that is a little bit of what we saw on
3 that screen earlier, right?

4 A. Right.

5 Q. And then you need to bombard that router with
6 authentication requests, is that right?

7 A. Well, yes and no. You need to bombard that
8 router with packets to create more vulnerable packets.

9 Q. A packet, for the Court's benefit, is that
10 the way in which data is transmitted using the internet?

11 A. Yes.

12 Q. So, if a computer is trying to talk to a
13 router, it sends packets to that router, is that right?

14 A. That's right.

15 Q. And then gets some sort of response?

16 A. Yes.

17 Q. And that is the process of the initialization
18 vectors, in order to grab or to gather as much
19 information from that router as possible; is that right?

20 A. That is the reason why you are sending --
21 that is why you are using Aireplay to send all of those
22 packets to that router, so that router would generate
23 IVs that you can collect.

24 Q. And basically what you are doing is you are
25 trying to talk to that router. If you don't have the

1 encryption key, that router is saying, no, you can't
2 talk to me.

3 A. Right.

4 Q. And sending back some data to the computer
5 saying: No, I am not going to talk to you.

6 A. Yeah, okay.

7 Q. Is that right?

8 A. Yeah, I mean, essentially.

9 Q. And the software allows the computer to then
10 repeat that request thousands of times, hundreds of
11 thousands of times, to gather enough information that
12 can be put into a software package to decrypt the
13 password?

14 A. Right, air -- excuse me, Aircrack is used to
15 do that.

16 Q. Okay. In terms of what you look at and your
17 investigation, did you determine how long, meaning days,
18 weeks, months, it took Mr. Ardolf to access the victim's
19 wireless router in this case?

20 A. It looked like there was some trial and
21 error. It looked like it took at least a couple of
22 weeks, maybe a month.

23 Q. The first fake Yahoo.com e-mail address was
24 created sometime in November of 2008, is that correct?

25 A. That is correct.

1 Q. The first attempts that you found in terms of
2 cracking, the wireless router looked like they would
3 have started sometime, end of January, beginning of
4 February, 2009?

5 A. Right.

6 Q. And the successful hacking of the wireless
7 router comes somewhere towards the middle of February of
8 2009; is that right?

9 A. Right.

10 Q. Right around the time the time of the first
11 e-mail that gets sent out on February 22nd of 2009?

12 A. Yes.

13 Q. I am going to show you, there are several
14 exhibits that we just offered, Agent Cameron, that show
15 both digital photos of the screens running BackTrack, as
16 well as -- they are called screen shots of the computer
17 running BackTrack that were found at Mr. Ardolf's
18 residence; is that right?

19 A. Yes.

20 Q. I will show you another example. Can you
21 describe for the Court what this is and where it was
22 found?

23 A. This was found in his bedroom.

24 Q. What is it?

25 A. On a thumb drive. These are the commands

1 that you use. This is the arrow down command to collect
2 packets from the target, and then it has the basis ID,
3 which is the MAC address.

4 And then it shows how to associate it with
5 the access point. You need to associate with the access
6 point before you can send packets to it. And that is
7 the Qwest 3984 router is the target.

8 Q. Actually, if I blowing up that middle
9 section, that Qwest 3984 is what?

10 A. That was the access point operated by the
11 victim.

12 Q. That was the Kostolniks' wireless router?

13 A. Yes, it was.

14 Q. And then it says at the bottom, "key found!"
15 with an explanation point. Is that the encryption key
16 for getting access to that wireless router?

17 A. Yes, that is the WEP key.

18 Q. I am going to show you Exhibit 55. And this
19 is the first page of Exhibit 55. And can you tell the
20 Court what this is -- actually the next page is going to
21 be showing? What is that?

22 A. This is the screen shot of the Kostolniks'
23 router.

24 Q. How was it that you would be able to obtain a
25 screen shot of Kostolniks' router? This was found in

1 Barry Ardolf's bedroom in the thumb drive, is that
2 right?

3 A. Yes, it was.

4 Q. How was it that he would be able to obtain
5 that screen shot?

6 A. You would have to be on the local network.
7 You would have had to be a user of that machine or on
8 that network.

9 Q. This is evidence that the router has been
10 hacked, is that correct?

11 A. Right. This is evidence that Mr. Ardolf was
12 on their network.

13 Q. And that's -- the same is true for
14 Exhibit 56, is that correct?

15 A. Yeah.

16 Q. And I am also going to show you Exhibit 57.
17 What are we looking at in terms of Exhibit 57?

18 A. These are, it looks like it's iwconfig is
19 like the wireless configuration of your system,
20 something you would run to find out all of your wireless
21 network cards. Ifconfig is just -- these are just Linux
22 commands.

23 Q. And for the -- what are Linux commands?

24 A. Linux is an operating system and Linux
25 commands are used to move around within that operating

1 system. These are used within a shell, so there is no
2 graphical user interface or anything. You just bring up
3 a terminal and use commands like this to find out what
4 is going on in your machine.

5 Q. And so, I asked you about Linux, and you say
6 it is an operating system. Most people are familiar
7 with Windows operating systems or MAC operating systems.
8 Is the Linux operating system similar to those things?

9 A. Yes.

10 Q. Generally speaking, is Linux something that
11 is used by people more technically savvy in computer
12 use?

13 A. I would say so.

14 Q. That is a not a normal operating system that
15 you would find in the course of ordinary residential
16 use, is that correct?

17 A. No.

18 Q. Okay. In addition to the hacking-related
19 evidence, Agent Cameron, you also found some child
20 pornography images; is that correct?

21 A. Yes, I did.

22 Q. Did you find -- I am going to ask you a few
23 different things. And I guess, first of all, there were
24 two images of child pornography at issue in this case,
25 is that correct?

1 A. Right.

2 Q. And what I am talking about is the image that
3 was sent and attached to the February 22nd, 2009, e-mail
4 to Dave Senger at Moss & Barnett, as well as a version
5 of -- an image that was posted on the fake MySpace page?

6 A. Right.

7 Q. They were slightly different images. The
8 MySpace page image, some of the faces of the children in
9 that child pornography image had their faces whited out;
10 is that right?

11 A. True.

12 Q. I am going to ask you -- I think the easiest
13 way to do this is to ask you about an image which is
14 Exhibit 13. And this shows, Agent Cameron, all of the
15 locations that that image that was attached to the
16 February 22nd, 2009 e-mail to Dave Senger were located,
17 is that right?

18 A. Yes.

19 Q. So, if I blow up the one on the far left
20 side, that is an image of the child pornography that was
21 attached to that e-mail, is that correct?

22 A. Yes.

23 Q. It has been redacted for display in the
24 courtroom, is that correct?

25 A. Yes.

1 Q. The image that was attached to the e-mail did
2 not have the black boxes on it, correct?

3 A. Correct.

4 Q. That same image was found in a number of
5 different locations, is that also right?

6 A. Yes.

7 Q. So, are those all listed on Exhibit 13, the
8 locations of the different computers?

9 A. Yes.

10 Q. Describe where you found -- or where each
11 were located.

12 A. Okay.

13 Q. Let me ask you first about the one that is
14 labeled Exhibit 1, and I am just going to focus on the
15 locations of it.

16 A. Right, that was on the thumb drive in his
17 bedroom.

18 Q. Okay.

19 A. On a computer tower in his bedroom.

20 On his laptop computer.

21 On a computer tower in his bedroom, on a
22 different one.

23 Q. And then lastly?

24 A. And that is on a Dell desktop computer in his
25 bedroom.

1 Q. And so just in general, that same image that
2 was attached to the February 22nd e-mail to Dave Senger,
3 you found five versions in five separate locations, five
4 separate digital storage devices on computers or digital
5 storage devices seized from Barry Ardolf's residence; is
6 that correct?

7 A. Yes, I did.

8 Q. Meaning that he had that same image on at
9 least five different locations?

10 A. Correct.

11 Q. I will ask you then about the second image
12 that we talked about, which is a MySpace image. And
13 Exhibit 26, on the left-hand side, Agent Cameron, that
14 is the image that was posted on the MySpace page, right?

15 A. Yes.

16 Q. And just for the sake of completeness, this
17 is the MySpace page that we are talking about, correct?

18 A. That is correct.

19 Q. It was created by Mr. Ardolf in the name of
20 Mr. Kostolnik, is that correct?

21 A. Yes.

22 Q. That was something that we are not going get
23 into the details of it, but you were able to link back
24 through a number of different text files and other
25 computer files and other investigatory materials that

1 this was something that was created by Mr. Ardolf?

2 A. Yes.

3 Q. You found things like the security question
4 and MySpace page the e-mail had been created with, those
5 sorts of things, located on his computer?

6 A. Yes. The text that was on the MySpace page
7 was on the subpoena returns linking the IP addresses to
8 other activity.

9 Q. And that is the child pornography image we
10 are talking about, correct?

11 A. Yes.

12 Q. And again, if we look at Exhibit 26, that
13 shows that MySpace image on the left-hand side, and then
14 on the right-hand side, what is shown on the right-hand
15 side?

16 A. The images that were found on his computers.

17 Q. Found those, that same image in three
18 different locations on three different computers
19 recovered from Barry Ardolf's residence?

20 A. Yes.

21 Q. I guess the first one was on the thumb drive,
22 second was on the generic computer tower in his bedroom,
23 and the third one was found on the Dell laptop computer?

24 A. Right.

25 Q. Meaning that Barry Ardolf possessed those

1 images on three separate computers at one time?

2 A. Yes.

3 Q. And that is true, also, with respect to the
4 other image that we talked about, because it was found
5 in five separate computer electronic storage locations,
6 that showed that Barry Ardolf possessed that image on
7 five separate devices in his residence at one time?

8 A. Yes.

9 Q. Agent Cameron, in addition to hacking
10 information, and in addition to the child pornography
11 that you found, did you also find, I guess for want of a
12 better term, files showing that Mr. Ardolf was
13 maintaining surveillance on the victims in this case?

14 A. Yes, I did.

15 Q. What kinds of things did you find?

16 A. For instance, he made notes in his text files
17 regarding there's a lot of cars over at their house
18 today. Maybe it is a birthday. Maybe I should take
19 note of this. Or there is a woman, I think it is the
20 grandma of Bethany with the husband with the wooden leg,
21 things of that nature.

22 This car with this license plate was parked
23 outside. I should take note of that. This might be a
24 birthday for the child, things of that nature.

25 Q. Did you also find extensive information

1 reflecting that Mr. Ardolf had done internet
2 surveillance on the victims in this case?

3 A. Yes.

4 Q. Found out where they worked, found out names
5 of co-workers, employees, bosses, supervisors, that sort
6 of thing?

7 A. Right. He had names of co-workers, bosses,
8 potential workplaces, and then he narrowed down
9 definitive workplaces for both of them, how to contact
10 these different businesses, their internet portals,
11 pictures, things like that.

12 Q. This is just one -- an example of one of
13 those things that is entitled
14 MattPKostolnikphonenumberandrelatives.txt; is that
15 correct?

16 A. Yes.

17 Q. And I am not going to show details of it, but
18 there are several text files that are found on Mr.
19 Ardolf's thumb drive that had this type of information
20 on it, correct?

21 A. Yes.

22 Q. I am going to show you Exhibit 74, and I am
23 going to turn it on its side, try to. Agent Cameron,
24 can you tell the Court what is shown in Exhibit 74?

25 A. This looks like an internet query through

1 Findlaw to Matt Kostolnik just from the internet. It
2 wasn't from a specific IP address or e-mail address. I
3 mean, I'm sorry, it was. This is coming through an
4 internet portal, not direct from an e-mail account to
5 Matt Kostolnik but through Findlaw.

6 Q. And this is something that was sent to Matt
7 Kostolnik at his workplace, is that correct?

8 A. Correct.

9 Q. Did you look and see, and sort of determine
10 what Findlaw is and how you could send an e-mail like
11 this?

12 A. Right. I went to the Findlaw site and
13 determined how it worked, and how you could submit
14 queries to different lawyers through that site.

15 Q. You could go to a website and you could click
16 on contact, the name of this person, and then send them
17 an e-mail; is that right?

18 A. Right.

19 Q. So, this was an e-mail that was received by
20 the victim on July 6 of 2009, saying I know where you
21 and your family lives and I will get you back for suing
22 us; is that correct?

23 A. Yes.

24 Q. I am going to show you Exhibit 77 and go to
25 page 4 of Exhibit 77. Do you see at the very bottom --

1 and Your Honor, may I approach? There is a mouse pad up
2 here that might make my mousing a bit more effective.

3 Do you see what I highlighted on the screen,
4 Agent Cameron?

5 A. Yes, I do.

6 Q. What is that?

7 A. That is the internet portal where you would
8 put in a submission to a particular lawyer, as
9 discussed.

10 Q. So, if you clicked on -- did you actually go
11 to those links? That is something you could put into
12 your web browser, right?

13 A. Right.

14 Q. If you go to those links, what came up?

15 A. The Findlaw sends it to the lawyer of choice,
16 your query.

17 Q. And it actually came up with Mr. Kostolnik's
18 e-mail address?

19 A. Yes.

20 Q. If we go to that same exhibit, can you take a
21 look at the very top portion of it and blow it up so it
22 is a little easier to see?

23 Is that something that was in that same text
24 file that you recovered from the thumb drive in Barry
25 Ardolf's bedroom?

1 A. Yes, it was.

2 Q. And does it talk a little bit about the
3 purpose behind some of the e-mails that were being sent
4 or some of the things that Mr. Ardolf was doing?

5 A. It looks like the motivation was to harm
6 Matt's career, get him fired or defame him in some way
7 so he would lose his credibility.

8 Q. And in fact, it says right there, this may
9 get Matt fired, correct?

10 A. That is right. And also, I mean, it also
11 could definitely damage his marriage if he was having
12 this -- if he was fired for approaching a female
13 co-worker for sex or other things, that could definitely
14 be damaging on a personal and professional level.

15 Q. Right below -- this is just an example. Let
16 me try not to get the whole thing in, but there are what
17 looked like a couple of cars that are listed on there
18 and then some license plate numbers. Do you see those?
19 I have tried not to pull the whole portion up, but it
20 looks like I did.

21 Is that an example of some of the
22 surveillance you are talking about, the notes?

23 A. Right. That is an example of the physical
24 surveillance.

25 Q. Now, I will ask you about Exhibit 75, and

1 this is the one that is a little hard to read, but I am
2 going to put it up as best I can.

3 What are we seeing in Exhibit 75, Agent
4 Cameron?

5 A. Well, it looks like a Liz Sharpen or someone
6 using her name wrote Bethany through the Edina Realty
7 website, and said: Hey, I have a message for you.

8 Q. And just in general, this is an e-mail that
9 was sent to one of the victims in this case at her place
10 of employment through that same sort of a web portal
11 that we talked about --

12 A. Right, the Edina Realty web portal.

13 Q. And what is in text of the message?

14 A. "I know your husband Matt. I am going to get
15 him. He is going to pay for getting me pregnant. Hell,
16 he already has three kids with you. I don't blame him
17 for asking me to have an abortion. He goes out at
18 night, but he doesn't..." it is hard for me to read.
19 "He goes out at night but he isn't always doing what you
20 think he's doing."

21 Q. This is something that was received by one of
22 the victims at the place of employment, correct?

23 A. That is correct.

24 Q. Did you find evidence that this was sent by
25 Barry Ardolf?

1 A. Yes, I did.

2 Q. I will show you, this is Exhibit 76. And
3 this was also -- this is from a text file called
4 BethanyKostolnik.txt, from a thumb drive recovered from
5 Barry Ardolf's bedroom.

6 We go in and see there are a number of pieces
7 of information on addresses and locations related to the
8 victims, as well as at the bottom, a list of relatives
9 of the victims. It continues on.

10 And then what is reflected in the middle
11 lower portion of that text file, Agent Cameron?

12 A. Right. That is just the address of the web
13 portal where the e-mail was submitted.

14 Q. Reflecting the Edina Realty web portal, is
15 that correct?

16 A. I'm not sure if that is the one, because it
17 is realestate.net.

18 Q. But, there is an Edina realty reference on
19 it?

20 A. Yes, absolutely.

21 Q. And then we go down to the next page, it
22 looks like there is sort of a practice e-mail there; is
23 that correct?

24 A. Yes.

25 Q. Similar to the one that was received from the

1 web portal, not exactly the same?

2 A. Right.

3 Q. Do you see a reference on there to the actual
4 web portal that would have resulted in e-mails sent to
5 the victim in this case?

6 A. Yeah, that is it.

7 Q. Where is that located?

8 A. That is the BethanyKostolnik.EdinaRealty.com
9 reference, contact.

10 Q. Right there?

11 A. Yes.

12 Q. And is that the kind of thing that you would
13 see if you punched in that URL?

14 A. That is it.

15 Q. I want to go back to Exhibit 76, because that
16 wasn't the only e-mail that Mr. Ardolf sent that went to
17 Edina Realty, is that correct?

18 A. Right.

19 Q. I am going to go back to Exhibit 76 and this
20 is page 4 of Exhibit 76. If you look at the bottom,
21 there is a reference in there stating it would have been
22 sent to a supervisor?

23 A. That is right.

24 Q. Suggesting that there was an inappropriate
25 suggestion by the victim in exchange for purchasing the

1 house, is that correct?

2 A. You can put it that way, yes.

3 Q. The details are in the text of the e-mail,
4 itself, right?

5 A. Yes, they are.

6 Q. The purpose of these several series of
7 e-mails is listed at the bottom of the screen I just
8 blew up, is that right?

9 A. That is right.

10 Q. What does it say?

11 A. Use the above page and send that e-mail to
12 Beth's co-workers. This will kill her career.

13 Q. All right. Agent Cameron, over the course of
14 your investigation, forensic investigation, did you come
15 across evidence that Mr. Ardolf had done similar types
16 of things to a former neighbor?

17 A. Yes, I did.

18 Q. How was it that you discovered that?

19 A. Upon reviewing the CDs and the hard drive, in
20 just doing forensic analysis, on one particular CD I
21 found some things that indicated he was targeting a
22 former neighbor in Brooklyn Park.

23 Q. What was it that you found that caused you to
24 think that?

25 A. There was a text file, initially I found a

1 text file. I think it was called Hackhimbad. And then
2 it had the victims' name, their address, their Social
3 Security number, their birth dates, their wife, their
4 children's Social Security numbers, things of that
5 nature.

6 And I found seven or eight instances of that
7 file with different notes and things and then I also
8 found some screen shots, or some scan images and some
9 files relating to that same victim later on, and a skull
10 was found there.

11 Q. Initially, though, you found that
12 "Hackhimbad," I'll put the screen shot up again. This
13 is a text file called Hackhimbad that you found on the
14 thumb drive from Barry Ardolf's bedroom, is that right?

15 A. Right.

16 Q. And on that there is an instance of, I will
17 try to avoid a lot of the information that is on there,
18 but there is a text file containing personal information
19 related to the people that are on the screen, the
20 Carstens, is that correct?

21 A. Yes, it is.

22 Q. When you came across that text file, did you
23 apply for a second search warrant to go and search for
24 other items related to the Carstens?

25 A. Right. I drafted a new affidavit, got

1 another search warrant for those items.

2 Q. I kind of jumped ahead. Did you actually
3 contact the Carstens before you did that?

4 A. Yes, I did. I contacted the Carstens and
5 asked them if they had allowed anyone to have their
6 personal information, you know, and got a general feel
7 for if there is any reason why this -- any legitimate
8 reason why this information would be out there or why a
9 neighbor would have this information.

10 Q. And before that, did you do some
11 investigation to determine the significance of the
12 address of the Carstens?

13 A. Yes, I think I went to Google maps, and in my
14 investigation I identified their home and where it was
15 on the map in relation to the subject's home -- or
16 previous home.

17 Q. And you determined that Barry Ardolf used to
18 live across the street from the Carstens?

19 A. Yes.

20 Q. And you talked to the Carstens?

21 A. Yes, I did.

22 Q. And you asked them about the information that
23 was found. Did you indicate that it was found on Mr.
24 Ardolf's computer or did you ask more general questions?

25 A. It was definitely more general questions at

1 first. I didn't want to get into any of that.

2 Q. And did you find out if they had received
3 some threatening communications in the past?

4 A. Yes, they got a threatening letter.

5 Q. Do you want to describe that for the Court?

6 A. The letter was a printout. I think there was
7 a Turbo Tax from like 2004 or 2005, and it had the
8 victim's name, and his wife's name, their Social
9 Security numbers, their income. So, it was like a
10 printout of a screen shot taken from their home computer
11 when they were doing their taxes. And there is a bunch
12 of skulls. There it is. There's a lot of skulls on the
13 side, and the text, "I told you about a year ago that
14 you should be very afraid. I can destroy you at will.
15 You sorry ass excuse for a human?"

16 Q. How was it that the Carstens had received
17 what is shown in Government's Exhibit 85?

18 A. They got it in the mail.

19 Q. Do you know when they got it in the mail,
20 when they received it?

21 A. I think it was 2009.

22 Q. March of 2009?

23 A. That sounds right.

24 Q. Was Barry Ardolf living across the street
25 from the Carstens in March of 2009?

1 A. No, he was not.

2 Q. In fact he had been moved away, gone from
3 that Brooklyn Park residence for almost a year; is that
4 correct?

5 A. Like eight months, seven or eight months,
6 nine months, something like that.

7 Q. So when you talked to the Carstens, they
8 showed you that they had received this in the mail in
9 March of 2009; is that correct?

10 A. That is right.

11 Q. And you then got a search warrant to search
12 for additional items related to any intrusion on the
13 Carstens' computer, correct?

14 A. Correct.

15 Q. What, if anything, did you find in addition
16 to the text files you talked about already?

17 A. I found some scanned images of checks and
18 bills paid, like mail that was -- it looked like the
19 mail was taken and scanned from the victim's home and
20 then stored on the thumb drive. Actually -- yeah, that
21 was on the CD.

22 Q. Okay. I am going to do my best to avoid the
23 address on the screen?

24 A. Right. So, the subject took the mail,
25 scanned it, and then saved the file to a CD.

1 Q. So, this was found on one of those CDs that
2 you had found in Barry Ardolf's residence, is that
3 right?

4 A. Yeah, it was on one of the ones we went
5 through earlier.

6 Q. It was a Discover bill, as well as a check
7 for the Discover bill?

8 A. Right.

9 Q. For the across the street neighbor?

10 A. Yes.

11 Q. Reflecting what, that it was taken out of
12 their mail and scanned?

13 A. Right. That was the only way I could
14 conceive it would get there.

15 Q. And that was Exhibit 88. Did you find
16 another scanned image of some of the Carstens' mail?

17 A. Right, another bill, and another check.

18 Q. And this is a the CenterPoint Energy bill, as
19 well as a check, and that was found in Barry Ardolf's
20 residence?

21 A. Right.

22 Q. The scanned image of it?

23 A. Yes.

24 Q. Did you also find some electronic evidence
25 other than the scanned image? I am going to ask you

1 about --

2 A. Yeah, I found some Girl Scout letters, and
3 some documents, letters written by Nannette.

4 Q. Okay.

5 A. Yeah, this is it.

6 Q. This is -- I will hold this up. This is
7 something that you found in the -- from the CD that was
8 in Barry Ardolf's residence; is that right?

9 A. Right.

10 Q. And again, how would you Mr. Ardolf have
11 gotten an electronic copy of a document created by his
12 across the street neighbors? First of all, how do you
13 know it was created by his across the street neighbors?

14 A. Just by right clicking and connecting to
15 properties and see who created the document. The
16 metadata says, for the author name, which is consistent
17 with Nannette.

18 Q. And there is a company listed on there. Did
19 you learn as part of your investigation that Mr. Carsten
20 worked for that company?

21 A. Yes, I did.

22 Q. So, in order to get an electronic version of
23 this document, how would Mr. Ardolf have gotten that
24 electronic version?

25 A. Well, either Nannette sent it to him in an

1 e-mail, or got it to him, or if he was on their network
2 and retrieved it from inside of their network.

3 Q. That would have been consistent with how he
4 would have been able to get their Turbo Tax records and
5 the other financial records, right?

6 A. Absolutely.

7 Q. And lastly, I am going to show you
8 Exhibit 87. Is this something that you also found on
9 one of the computers at Barry Ardolf's residence?

10 A. Yes.

11 Q. Okay. And that is a skull. Did you compare
12 that to the skull that was on the letter that was sent
13 to them?

14 A. It would be the same skull.

15 Q. So, that is the same skull that was shown in
16 Exhibit 85?

17 A. Correct.

18 Q. Agent Cameron, when you interviewed the
19 Carstens, did you also ask them about whether in
20 addition to this letter that they had gotten, that they
21 had ever gotten any other threatening communications?

22 A. Right. They said that they got printed out,
23 a printed-out threat, one or two, I can't remember, that
24 came out on their home printer. It just shot out of
25 their home printer. They thought it was a prank, maybe,

1 from a neighborhood kid, but it was a very threatening
2 similar in the language to this Turbo Tax message.

3 Q. Again, if Mr. Ardolf printed out a
4 threatening message on their home computer, how would he
5 be able to do that?

6 A. He would have to be on their network. They
7 also said that their home page and home screen was
8 changed to pornographic images on a couple of occasions
9 and they said they couldn't attribute that to anybody,
10 either.

11 Q. Did you, when you interviewed the Carstens
12 find out what the source of any friction was between Mr.
13 Ardolf and the Carstens?

14 A. Yes. The Carstens had two disabled twin
15 daughters and their personal care attendants would park
16 in front of Mr. Ardolf's home. Apparently Mr. Ardolf
17 did not like that they parked their truck in front of
18 his home, so they had a lot of friction. There was a
19 several unexplained damages to the vehicle or vehicles,
20 and personal confrontations, as well.

21 Q. Agent Cameron, we submitted some new exhibits
22 here today. In the course of your investigation, is one
23 of the things that you do is monitor correspondence,
24 communications from people when they are in jail?

25 A. Yes.

1 Q. And why is that?

2 A. Well, we want to know what is going on. We
3 want to see if there is anything illegal going on,
4 things of that nature.

5 Q. Did you have some concern over the course of
6 the investigation that based on prior conduct by Mr.
7 Ardolf that he would attempt to continue any retaliation
8 against the victims in this case while he was still in
9 jail?

10 A. Yes. We were concerned that he might have
11 other people act on his behalf to do harm to the victims
12 or other people involved in this case.

13 Q. And that is one of the reasons that you would
14 be monitoring jail correspondence?

15 A. Yes.

16 Q. Agent Cameron, I am showing you Exhibits 160
17 through 163. Are those letters, copies of letters that
18 were sent by the Defendant while he was in jail?

19 A. Yes, they are.

20 Q. And in general, if you can identify for the
21 record the date, and without using full names, the
22 recipients of each one, specifically with respect to
23 Exhibits 160, 161 and 163, using the initials?

24 A. Right. 160 was written from Barry to T.A.,
25 and -- can you help me out here? I don't know where the

1 date is on this.

2 Q. If it doesn't have a date on it, it is an
3 exhibit or a letter that was sent while Mr. Ardolf was
4 in jail, which would have started in July of 2010, is
5 that correct?

6 A. Yes.

7 Q. Sometime after July of 2010?

8 A. Right. And I don't see a date on it.

9 Q. Okay. How about 161?

10 A. Is 161 was written from Barry to K.T.A. and
11 that looks like January 25th, 2011.

12 Q. 162?

13 A. 162 was written from Barry to S.A.. And that
14 was written on January 11, 2011.

15 Q. 163?

16 A. 163 was written from Barry to T.A.. it says
17 November 1st, so that has to be November 1st, 2010.

18 MR. RANK: Your Honor, I referenced those and
19 excerpted them in the position pleadings, and so I am
20 not going to put any additional testimony in at this
21 time.

22 With that, I have no further questions for
23 Agent Cameron.

24 THE COURT: With or without consultation,
25 with Mr. Ardolf, do you wish to inquire?

1 MR. O'BRIEN: Thank you.

2 Your Honor, if it is acceptable, I have some
3 cross-examination of Mr. Cameron. And the before I
4 finish, if I could just consult with Mr. Ardolf to see
5 if he has something that he wants me to supplement?

6 THE COURT: Certainly.

7 MR. O'BRIEN: I understand Agent Cameron's
8 testimony to deal with the proposed enhancement for
9 special skills. And then secondly, the number of
10 images. And then thirdly, there was discussion of other
11 instances where Mr. Ardolf had hacked into neighbors and
12 other people, and I assume that that was offered for the
13 purpose of establishing generally a just and reasonable
14 sentence, as opposed to establishing an enhancement in
15 the case. I believe Agent Cameron's testimony only
16 involved two enhancements, the one for special skills
17 and the one for the number of images.

18 THE COURT: Mr. Rank?

19 MR. RANK: I think that is generally
20 accurate, Your Honor, except to the extent the jail
21 letters go to the obstruction enhancement and the
22 acceptance of responsibility request.

23 But, in general, that is true. And also,
24 Counsel is correct, they are offered for the purpose of
25 providing a more complete picture of the Defendant and

1 and the Defendant's conduct.

2 THE COURT: All right.

3 CROSS EXAMINATION

4 BY MR. O'BRIEN:

5 Q. Good morning, Agent Cameron.

6 A. Good morning.

7 Q. When you executed the search warrant in July
8 of 2009, you interviewed Mr. Ardolf. And you asked him
9 a question about WEP or WPA. What are those terms?

10 A. Wired equivalent privacy protection, that is
11 WEP. And WPA is an upgrade from that, another form of
12 encryption.

13 Q. So, there are different levels of encryption,
14 different standards, correct?

15 A. Yes, there are. There are several.

16 Q. In fact, some people don't have any
17 encryption at all on their wireless router, right?

18 A. These days most do out of the box. But, in
19 2009, let's say -- I am sure some people didn't.

20 Q. And out of the box, it is usually a WEP, WEP
21 encryption standard, correct?

22 A. It depends on where you buy. Now some are
23 coming with WPA; but, yeah, probably in 2009 they were
24 WEP encrypted.

25 Q. And WPA is a securer security level than WEP?

1 A. Yes, it is, absolutely.

2 Q. And what Mr. Ardolf was learning was how to
3 crack the lower-level WEP encryption standard, correct?

4 A. Well, that was the focus of the
5 investigation. There are tools on BackTrack to crack
6 WPA. But, in this particular case, yes.

7 Q. Because the neighbor had a WEP-encryption
8 standard?

9 A. That is right.

10 Q. And there were other neighbors whose
11 computers were accessed, correct?

12 A. Right.

13 Q. And they had no encryption at all, right?

14 A. I'm not sure if they had encryption or not,
15 because I don't know which one of those access points --
16 they were interviewed, and they couldn't remember.

17 I looked at the printout on the Kismet
18 screen, and it looked like the majority of those were
19 encrypted. If we go back to that exhibit, we can look
20 at it, but it looked like most of them were WEP or WPA.

21 Q. And again, that is the lowest level of
22 encryption you can buy?

23 A. WEP was the initial encryption used by all
24 computers. Now, today, yes, it is a lower tier.

25 Q. Now, the book, one of the books that was

1 found in the search warrant was called a "Beginner's
2 Guide to Cracking WEP," right?

3 A. Right, that was the manual, yeah.

4 Q. You have had a lot of special training,
5 correct?

6 A. Yeah. Yes, I have.

7 Q. You have worked in the industry and then you
8 have gotten special training to become an agent?

9 A. Yeah, I have had a lot of training.

10 Q. Far superior to the training that Mr. Ardolf
11 has had?

12 A. I can't -- probably. I mean, he was
13 attending Capella University and things of that nature,
14 so I don't know the extent of his training.

15 Q. Do you believe that you would have any
16 trouble cracking a WEP-encrypted wireless router?

17 A. I think I can. No, I would not have any
18 trouble.

19 Q. It wouldn't take you two to four weeks, would
20 it?

21 A. Probably not.

22 Q. You could do it relatively quickly, right?

23 A. You know what? I haven't tried, but I am
24 sure it wouldn't.

25 Q. Okay. Once you crack the WEP encryption,

1 that allows someone to access another person's wireless
2 internet connection, right?

3 A. Right.

4 Q. And so once you -- is it then that you have a
5 password that allows you to access that other wireless
6 router?

7 A. No, it is just the WEP key, itself, is the
8 password. The WEP key we saw on the screen earlier is
9 the password to the router. It is like how you
10 authenticate to a router, say at a hotel with the
11 password. The SSID is: Hotel one. Then it says, type
12 in the key. And you are on their network. So, that
13 type of thing.

14 Q. Once you have that key, you pretty much have
15 free rein to get on to that wireless router when you
16 want to. All you have to do is enter the key, right?
17 You don't have to redo the cracking process more than
18 once, right?

19 A. No, unless the key has been changed, that key
20 will be consistently good for that router.

21 Q. And you can access a wireless router now with
22 a smart phone, right?

23 A. Yeah.

24 Q. And you can access it with a laptop computer?

25 A. Right.

1 Q. You don't have to be at a traditional
2 computer in a home in order to access a wireless router,
3 right?

4 A. Right. There's numerous devices.

5 Q. And you have to be within range of the access
6 point, right? Of the router, wireless router?

7 A. True.

8 Q. Now, there were -- in the course of your
9 investigation, you found images of child pornography,
10 right?

11 A. Right.

12 Q. Now, the image that is included, well that is
13 depicted in Exhibits 13 and 26 of the three children --

14 A. Is that the one that is --

15 Q. That was up on the --

16 A. The one with the whited out faces and the
17 other one with --

18 Q. Yeah.

19 A. Yes.

20 Q. That was the only depiction of child
21 pornography that existed, right?

22 A. Those instances I described are what I found,
23 yes.

24 Q. And what you found was you found that same
25 depiction in different computers and in different

1 storage devices, right?

2 A. Right, the straight depiction, and then the
3 one with the whited-out faces, right.

4 Q. Right. And then one of those depictions was
5 sent in the e-mail on February 22nd of 2009, correct?

6 A. Yeah.

7 Q. One was posted on the MySpace site, correct?

8 A. True.

9 Q. And then there were five separate images
10 found in the drive free space on --

11 A. I think there was one. There was one image
12 in drive free space.

13 Q. One image in drive free space?

14 A. Right.

15 Q. Drive free space, is that not -- doesn't that
16 mean that there was once an image there, but the image
17 has been deleted, so drive free means there is no image
18 in that space?

19 A. No, the image was in that space. The image
20 was on the computer, then it was put into the recycle
21 bin, and then it was deleted. But the image still
22 exists on the computer. The computer marks it as free
23 space, but the full image was still on that machine.

24 Q. Can a computer user see that image if they
25 access it once it has been deleted?

1 A. Not if they are coming from the native
2 operating system.

3 Q. So, that tells me that you need some forensic
4 tools to access that image once it has been deleted?

5 A. Well, you could externally mount it. You
6 would need specialized tools to find that image.
7 There's free tools and things you can use to find that
8 image in the free space. You need a little bit of
9 knowledge to find it.

10 Q. What if the free space is overwritten?

11 A. If the free space was overwritten, then the
12 image would be gone.

13 Q. But, in this case the free space was not
14 overwritten?

15 A. No.

16 Q. So, were you able to recreate that image,
17 right?

18 A. Not recreate it, I was able to identify it,
19 right.

20 Q. You were able to see the image?

21 A. Yes.

22 Q. And without the program that you had as part
23 of law enforcement, you would not have been able to see
24 that?

25 A. Well, just for clarification I was using the

1 forensic toolkit, but there are numerous ways to
2 retrieve images from free space that aren't privy, or
3 aren't unique to law enforcement that, are publicly
4 available.

5 Q. Software, right?

6 A. Well, you could use software or hardware --
7 yes, in this case, it was software.

8 Q. Now, you did a thorough search of all of the
9 computers and storage units or drives that were found at
10 the Ardolf residence, right?

11 A. No, I didn't go through every single hard
12 drive or anything.

13 Q. But you did search them, right? You did
14 search them?

15 A. I did search.

16 Q. You did search the computers, the hard
17 drives?

18 A. Yeah, all of the ones pertinent to this case,
19 I did go through them, yes.

20 Q. And the reason you went through them was you
21 were interested to see if there was other child
22 pornography, other images of child pornography, right?

23 A. I was looking for any evidence pertinent to
24 the case, whether people were targeted, that included
25 the child pornography.

1 Q. Now, did you find any evidence that Mr.
2 Ardolf had the program necessary to recreate that image
3 once it had been deleted?

4 A. He did have a number of -- I would have to
5 look at his bookshelf and look at the forensic CDs that
6 were identified. I can't remember right now if he did
7 have that software.

8 He did have numerous, obviously
9 technically-advanced software products. I'm not sure if
10 he had that particular program or programs that he could
11 do that. With the program like BackTrack, I think there
12 is software within that framework where you could
13 retrieve images from free space.

14 Q. Is it your testimony that you know that Mr.
15 Ardolf had that software that would have allowed him
16 to --

17 A. No, my testimony is I don't know.

18 Q. So, you don't know if he had it or not?

19 A. No.

20 Q. What is the name of the program that you used
21 to recreate or to identify the image after it had been
22 deleted?

23 A. Forensic Toolkit.

24 Q. Forensic Toolkit is the name?

25 A. Yeah, FTK.

1 Q. Did Mr. Ardolf have FTK?

2 A. I didn't see it, no.

3 Q. Once the image is deleted, but not
4 overwritten, can an image be sent without being
5 reconstructed by the FTK?

6 A. You are asking if he booted up the operating
7 system, could he pull that image from free space and put
8 it into an e-mail?

9 Q. We are talking disk free space, right?

10 A. Right.

11 Q. Yes. Yes, that is my question.

12 A. Yeah, if he boots up Windows and there is
13 something in disk free space, he wouldn't have access to
14 it from the native operating system. So, he wouldn't be
15 able to e-mail that from the operating system like that,
16 no.

17 Q. So, on January 21st, 2009, when the search
18 warrant was executed, Mr. Ardolf could not have
19 transmitted the deleted image in the disk free space?

20 A. Well, not -- no, not as it was identified.

21 Q. And again, it wasn't -- in order to identify
22 it, he would have needed the Forensic Toolkit which you
23 didn't find in all of the computers and hard disk drives
24 that he had?

25 A. No. Basically, there are several different

1 programs that can be used to retrieve -- it is not
2 unique to FTK. There are a multiple of programs that
3 can be used to retrieve free space. It is very common
4 in forensics.

5 Q. Right. The information that you had, though,
6 from analyzing the computers and the hard drive taken
7 from the Ardolf residence was that he did not have a
8 program capable of doing that, right?

9 A. I don't know.

10 Q. You didn't see one. You didn't find one?

11 A. I didn't look for one.

12 Q. Did you find one?

13 MR. RANK: Objection, asked and answered.

14 THE COURT: I think the answer is no, he
15 didn't find one because he didn't look for one.

16 MR. O'BRIEN: Now, Your Honor, if I could
17 just check with Mr. Ardolf and see if he has anything?

18 THE COURT: Certainly.

19 (Discussion off the record.)

20 BY MR. O'BRIEN:

21 Q. The ability to access WEP-encrypted wireless
22 router can come from sources that are readily available
23 online, correct?

24 A. Yeah, I mean, that is where everything that
25 was -- or most of the things were online, yeah.

1 Q. And it is free software that anyone can get
2 online?

3 A. Yes.

4 Q. And that's why -- you wouldn't advise anyone
5 to have just a WEP-encrypted wireless router, right?

6 A. Probably not, no. It is vulnerable. I
7 wouldn't advise that.

8 Q. Now, there were two images that were sent --
9 I'm sorry, there was -- the image of the three children
10 was sent on an e-mail, on an e-mail attachment that went
11 out on February 2nd, 2009, correct?

12 A. Right.

13 Q. And it was posted on a MySpace site, correct?

14 A. Right.

15 Q. And there were -- that image was found on
16 digital storage devices, right?

17 A. It was on computers and -- yes.

18 Q. Okay. But --

19 A. There was no physical copy of it, is that
20 what you are asking?

21 Q. Well, no, not really. I am trying to get a
22 number of how many images there were in the different
23 computers and storage devices.

24 A. Well, there was the five, plus the three, so
25 that would be eight.

1 Q. There is the two, the e-mail and the --

2 A. Well, the e-mail and the MySpace --

3 Q. And MySpace is two?

4 A. Is two. And then --

5 Q. Okay. And then five were in the, on
6 Exhibit 13, the separate digital storage devices, right?

7 A. Right.

8 Q. But, of those five, one had been -- at least
9 one had been deleted?

10 A. Well, one was in drive free space. So, yeah.

11 Q. Was it more than one?

12 A. One. One was in the recycle bin, and one
13 was in drive free space.

14 Q. They had both been deleted, right?

15 A. No. One had been put in the recycle bin and
16 the other one had been deleted, and they were on
17 different devices.

18 Q. And there were three of these images found on
19 separate computers, three of these computers had this
20 image, right?

21 A. No, five.

22 Q. No, we are talking about the digital storage
23 devices of -- there were five on the digital storage
24 devices of Exhibit 13?

25 A. Five different devices.

1 Q. Right, which would have been --

2 A. Five different images on five different
3 devices.

4 THE COURT: One person at a time, please?

5 MR. O'BRIEN: I'm sorry.

6 THE COURT: That is all right.

7 BY MR. O'BRIEN:

8 Q. Five were on the storage devices, right?

9 A. Right. There were five images on five
10 different storage devices, correct.

11 Q. One was in the recycle bin?

12 A. Right.

13 Q. And one had been deleted?

14 A. Right.

15 Q. And then there were three, these images were
16 found on three computers?

17 A. I would have to look at the spot. I believe
18 it is five different devices, so I don't know how many
19 of those -- I would have to bring up the slide to see
20 how many of those were USB and how many of those were on
21 computers. I can't remember.

22 Q. Well, this is important. Your testimony was,
23 as I have it written down, that when you were asked
24 about Exhibit 26 and you said that those were images
25 that were found on three separate computers.

1 A. Okay. So, you are talking about image 26 is
2 the whited-out faces image, correct?

3 MR. RANK: Your Honor, we have the exhibits,
4 if you want to ask him about a specific exhibit -- I am
5 going to object in terms of asked and answered on the
6 questions. If you want the specific exhibits with the
7 specific locations, I can pull them out.

8 THE COURT: If Mr. O'Brien wants to use them,
9 those is fine.

10 MR. RANK: I would be happy to put them on
11 the screen so we can calk about the exact locations on
12 the exhibit.

13 MR. O'BRIEN: Will you pull up 26, please?

14 BY MR. O'BRIEN:

15 Q. Agent, this is Government Exhibit 26. These
16 are the images, the image that was posted on the MySpace
17 page, also on the computer in the thumb drive recovered
18 from the Ardolf residence, right?

19 A. Yes. It looks like two computers, one thumb
20 drive.

21 Q. All right. So, there are three images in
22 Exhibit 26, right?

23 A. Right.

24 Q. Okay. And on exhibit --

25 A. Well, four including the MySpace.

1 Q. Four including the MySpace, but we already
2 counted that.

3 A. All right.

4 Q. And then Exhibit 13 there are five instances
5 where this image was located?

6 A. Right.

7 Q. But, one was in the recycling, and one was
8 deleted, right?

9 A. Right. Of the five cited on the right-hand
10 side, one was in free space and one was in the recycle
11 bin, correct.

12 MR. O'BRIEN: Thank you. Thank you, Your
13 Honor.

14 THE COURT: How much redirect do you have?

15 MR. RANK: Just briefly, five minutes.

16 THE COURT: Well, let me ask, Counsel, now,
17 maybe this isn't the -- I think we have maybe more than
18 two choices, but to try to be fair to everyone,
19 including people in the gallery and try to be efficient
20 with their time and yet try not to make either party
21 feel like, well, we don't want to -- we have issues
22 around the noon hour.

23 We can either -- we will try to finish up Mr.
24 Cameron. I assume he will still be here for the rest of
25 the hearing. And then it seems to me, because we have

1 to take, one of two things, either a fifteen-minute
2 break immediately, if for no one else in the room, my
3 Court Reporter. Or, we could say, because for those in
4 the courtroom, if we were going to do that, most
5 important to the parties, we would run. Much like when
6 we pick a jury in a criminal case, we will run close to
7 one if in fact we could finish. But, it tramples on
8 people's medical needs sometimes without lunch, just
9 with a fifteen-minute break. The other option is to
10 take a -- to take a little pressure off the lawyers and
11 clients, well we have to rush, rush, rush on such an
12 important -- all of these important issues -- take
13 something like a 45-minute, unless you ask for an hour
14 recess, and then just go until we are -- go until we are
15 done.

16 Because it seems to me that the likelihood of
17 this whole thing -- you are all going to get in what you
18 want to get in apart from Agent Cameron in the next
19 45 minutes, say, if we take a break, is not entirely
20 realistic. I don't know how much oral argument people
21 have and the like, but you two would know that and Mr.
22 Ardolf would know that better than I. We have those two
23 options, it would seem to me.

24 MR. RANK: Your Honor, I have only a couple
25 of minutes with Agent Cameron. And my preference would

1 be the fifteen-minute break option so we could continue
2 through. We have briefed the issues.

3 THE COURT: Well, and I am sorry to
4 interrupt, but maybe unless Mr. O'Brien or Mr. Ardolf
5 disagree, worst case scenario, even if that doesn't work
6 out is if we get to a point where we need to take a
7 lunch break, we will take it. It is just that I will
8 run through part of the noon hour. But, we will reach a
9 point where, I think, in fairness to everyone, we will
10 have to take a break, even assuming there's no diabetics
11 or other individuals who need -- but, Mr. O'Brien,
12 whether you need to chat with your client briefly about
13 strong views one way or the other?

14 MR. O'BRIEN: Thank you.

15 (Discussion off the record.)

16 MR. O'BRIEN: I think Mr. Rank had a good
17 suggestion, Your Honor. We are fine with it.

18 THE COURT: All right. Why don't you proceed
19 with your redirect, if you wish?

20 MR. RANK: Thank you, Your Honor.

21 THE COURT: So, for the folks in the gallery
22 and for the Government and the Defense, when we are done
23 with Mr. Cameron, we will take a fifteen-minute recess
24 and then reconvene. And we will see where we are
25 45 minutes in afterwards. All right?

1 MR. RANK: Thank you, Your Honor.

2 REDIRECT EXAMINATION

3 BY MR. RANK:

4 Q. Agent Cameron, you, as part of your
5 investigation, you looked at some of the items that were
6 seized from Mr. Ardolf's bedroom; is that correct?

7 A. Yes.

8 Q. And you also determined that he was going to
9 Capella University to get his Information Technology
10 Degree, is that correct?

11 A. Right.

12 Q. And he actually had an emphasis on
13 information technology in this network security and
14 penetration testing, is that correct?

15 A. Right.

16 Q. That is essentially hacking, correct? Or
17 that is part of the area you were looking at,
18 penetration or hacking?

19 A. Right.

20 Q. And network security, protecting against
21 hacking, correct?

22 A. Correct.

23 Q. And I am going to show you, he had lots of
24 books on computer technology, correct?

25 A. Right.

1 Q. I am just showing you a few that were
2 admitted at trial as Exhibit 115. These are, I mean I
3 see on here, hacking, one, two, three, four hacking
4 books that are on there. There are also some network
5 security books, is that correct?

6 A. Yes.

7 Q. And if I move on to 116, that is the other
8 side. This is on the headboard above his bed, is that
9 correct?

10 A. Right.

11 Q. These are more books on network security,
12 including hacking, is that correct?

13 A. Correct.

14 Q. And there is also one that is on there that
15 is CWNA. What is that?

16 A. Certified wireless network administrator. It
17 is a certification.

18 Q. That is sort of -- a wireless network
19 administrator, if you were taking that class, would you
20 learn about things like the difference between WEP and
21 WPA?

22 A. Yes.

23 Q. And how to set up and how to get around
24 encryption?

25 A. Right. It's on configure networks, security

1 configured wireless networks using different forms of
2 encryption, and things like that.

3 Q. And there is a Pen. Tester's Open Source
4 Toolkit. Pen. Tester, that is a combination of two
5 words, penetration, tester?

6 A. Right.

7 Q. What does that mean, in general?

8 A. Well, you can enumerate networks, either
9 internally or externally and find out what IPs they are
10 operating on, what operating system they are using. You
11 can see if they have any open ports, things of that
12 nature.

13 Those are used to test -- like penetration
14 testers are hired by banks and companies like that to
15 test their network, to protect it against attack.

16 Q. And the books and other things that are
17 reflected in the exhibit forms of 115, 116, 117 among
18 other things show that Mr. Ardolf was educated on
19 detecting network vulnerabilities, correct?

20 A. Absolutely.

21 Q. And circumventing those network
22 vulnerabilities?

23 A. Right.

24 Q. Precisely what he did to the victims in this
25 case?

1 A. True.

2 Q. Do most people have these books on the
3 headboards of their beds in their houses?

4 A. No.

5 Q. In general, in this case, Agent Cameron, in
6 order to do what Barry Ardolf did in this case, he had
7 to obtain multiple e-mail addresses from Yahoo.com and
8 gmail.com, is that correct?

9 A. Correct.

10 Q. He did that by going to a library computer
11 and then also using some neighbor's wireless routers in
12 order to avoid being detected back to his computer,
13 correct?

14 A. Correct.

15 Q. He then took -- after he had done that, he
16 set upon his plan to hack into the victim's wireless
17 router in this case, correct?

18 A. Correct.

19 Q. To do that, he taught himself how to hack the
20 system?

21 A. True.

22 Q. Using, I would guess, some background
23 material that he had learned in his education reflected
24 on the books on his headboard?

25 A. That and the desk, yes.

1 Q. He obtained manuals on using BackTrack, as
2 well as the BackTrack software?

3 A. Correct.

4 Q. He used a bootable version that -- BackTrack
5 is a bootable version of software, is that correct?

6 A. Right.

7 Q. Which means you have to know how to use a
8 Linux operating system?

9 A. Right, and you have to modify the bios to
10 boot to the CDs. Most systems aren't -- so, I mean, you
11 need some technical ability there.

12 Q. All right. So, you have to modify the bios
13 to boot the CD. Does that mean you have to make some
14 changes to your own computer hardware in order to be
15 able to run a bootable CD?

16 A. No, not hardware. You just stop it on boot,
17 and then you get to a menu, a blue screen menu. It
18 looks very old to most people; but, you get to the blue
19 screen menu, then you pick out your bios and then you
20 have to change some settings in there.

21 Q. Okay, he used the Linux operating system,
22 obviously. And as I was going through the list, he ran
23 a number of different software programs in order to
24 ultimately crack the encryption, correct?

25 A. Right.

1 Q. And he used Kismet, he used AirMon, Airodump,
2 Aireplay and ultimately Aircrack?

3 A. Right.

4 Q. And then he used that to be able to get on
5 the victim's wireless router, to then send e-mails using
6 the victim's wireless router in order to make it look
7 like the victim was actually sending those e-mails?

8 A. Right.

9 Q. Agent Cameron, Mr. O'Brien asked you about
10 the images in this case. I will ask you about, first,
11 Exhibit 13.

12 So, what Exhibit 13 shows is that Mr. Ardolf
13 had one, two and three that are reflected on Exhibit 13,
14 those were all saved versions of the image; is that
15 correct?

16 A. Correct.

17 Q. And there in the upper right-hand corner is
18 the file name that he gave that file on his computer
19 tower found in his bedroom was "FamilySex14-year12-year
20 and 10.jpeg." Is that correct?

21 A. Correct.

22 Q. There is also, the other two that he saved,
23 he saved one which is reflected in image number one, on
24 the thumb drive he saved it under the name
25 "Kostolnik_MyFavorite.jpeg." And then he saved it in

1 the same file name in the image that is number three, is
2 that correct?

3 A. Correct.

4 Q. In image number four, Counsel asked you about
5 that one because it was found in the drive free space on
6 yet another computer, is that correct?

7 A. Right.

8 Q. And that computer, the Optiplex GX270 desktop
9 computer, that is -- you didn't find, I guess reflected
10 on this exhibit, you don't see any other image that is
11 on that Dell Optiplex GX270, is that right?

12 A. Right.

13 Q. So, that means that the Defendant possessed
14 that image on that computer at one point in time,
15 correct?

16 A. Correct.

17 Q. And it was still on that computer when you
18 did the forensic analysis?

19 A. Right.

20 Q. And even if you attempted to delete it, which
21 I think you were explaining to Mr. O'Brien was that the
22 image just stays there, but it just takes the pointer
23 away from that image?

24 A. Right.

25 Q. It can be pulled off by using software. But,

1 ultimately, what that reflects is that that image was on
2 the computer at the time you did the search warrant,
3 right?

4 A. Right.

5 Q. And at one point in time, the Defendant had
6 it on the computer in a version that he could see?

7 A. Right.

8 Q. Lastly, with number five, that was from yet a
9 different computer, the Dell laptop computer found in
10 Mr. Ardolf's bedroom, and that was in the recycle bin?

11 A. Right.

12 Q. That means the little icon on your desktop
13 that you dump things into, that you can go in and
14 retrieve them out very easily?

15 A. Right.

16 Q. That is not something you need any forensic
17 software for?

18 A. No, you just go to the folder and restore the
19 file.

20 Q. Then I am going to ask you just quickly about
21 Exhibit 26, try to. So, with respect to the three
22 images on the side, one was found on the thumb drive
23 that was in Barry Ardolf's bedroom, saved as
24 2Family.jpeg.

25 So, in order to do that, Mr. Ardolf had to go

1 in and use some modification tools, draw tools to be
2 able to change the faces or mark up the faces on there,
3 is that correct?

4 A. Yes.

5 Q. And then save it under a different file name,
6 correct?

7 A. Right.

8 Q. And we saw different file names in
9 Exhibit 13, right?

10 A. Right.

11 Q. And that was on the thumb drive. Number two,
12 same image found on the generic computer tower from his
13 bedroom, correct?

14 A. Correct.

15 Q. And then that last one, image three, that was
16 found on another laptop Dell computer found in his
17 bedroom?

18 A. Correct.

19 Q. Again, what that reflects, both Exhibits 13
20 and Exhibit 26 reflect that at one point in time Mr.
21 Ardolf possessed eight separate images of those
22 computers -- eight separate images of the child
23 pornography on those computers or electronic storage
24 devices?

25 A. Correct.

1 Q. In addition to the image posted on MySpace
2 and the image sent in the e-mail to Mr. Senger?

3 A. Yes.

4 MR. RANK: Thank you. Nothing further, Your
5 Honor.

6 THE DEFENDANT: Your Honor, I have some
7 questions which my standby attorney did not ask.

8 THE COURT: What we will do is, we will take
9 our fifteen-minute recess and put Agent Cameron back on
10 the stand. We will take up that issue.

11 I will likely, once the two of you consulted,
12 whether I have Mr. O'Brien ask the questions or you,
13 that will depend on what I am told when we come back.
14 So, let's take 15 minutes, here.

15 And then I think the folks in the courtroom
16 can assume we will run for at least 45 minutes, and if
17 we are not done, then we will take some type of short
18 lunch break, but we will take at least 45 minutes when
19 we come back. Stand in recess.

20 (Recess.)

21 THE COURT: You may all be seated. And Agent
22 Cameron, if you would retake the stand, sir?

23 Mr. Ardolf, did you have sufficient time to
24 consult -- I don't want to know what was said between
25 the two of you, but did you have sufficient time to

1 consult with Mr. O'Brien?

2 THE DEFENDANT: Yes. Thank you, Your Honor.

3 THE COURT: So, is it with your consent that
4 he is going to follow up with some other questions?

5 THE DEFENDANT: Yes.

6 THE COURT: Mr. O'Brien?

7 MR. O'BRIEN: Thank you.

8 RECROSS EXAMINATION

9 BY MR. O'BRIEN:

10 Q. Agent Cameron, in order to de-encrypt a WEP
11 standard, you need some technical ability, right?

12 A. Right.

13 Q. And you can get that technical ability by
14 reading tutorials that are readily available online,
15 right?

16 A. Right.

17 Q. You don't need a college degree?

18 A. No.

19 Q. And you don't need superior computer skills
20 to do that?

21 A. Well, I guess that is objective.

22 Q. Well, what is your opinion?

23 A. I would say the majority -- no one that I
24 know of knows how to crack WEP.

25 Q. No one you know knows how to? I'm sorry, I

1 didn't hear you.

2 A. No one in my personal life knows how to --
3 the majority of people I have met don't even know how to
4 crack WEP or what encryption they are using.

5 Q. Does it require special superior computer
6 skills to crack WEP?

7 A. Yes.

8 Q. Now, there were a number of books that were
9 found in the Ardolf home. If someone had read those
10 books and understood them, would it have taken two or
11 four weeks to de-encrypt a WEP standard?

12 A. It might. I don't think any of those books
13 dealt specifically with WEP.

14 Q. So, there was some laptop computers that were
15 found in the Ardolf home, right? During the search
16 warrant?

17 A. Yeah.

18 Q. And laptop computers typically have a WiFi
19 ability, right?

20 A. Right.

21 Q. There were a number of PCs found in the home.
22 PCs typically don't have WiFi ability, right?

23 A. It depends on how they are configured. You
24 can put a wireless card on a desktop just as well as you
25 can a laptop.

1 Q. Did the desktop computers at the Ardolf home
2 have those wireless cards?

3 A. Yes, they had several wireless cards.

4 Q. Do you know if the -- you found some
5 BackTrack CDs in the home, right?

6 A. Right.

7 Q. And those were important because those are --
8 that is the information -- those contain the information
9 that you need to de-encrypt the WEP, right?

10 A. The BackTrack framework contains the programs
11 necessary to crack WEP.

12 Q. Did you see if those functioned on the laptop
13 computers that were found in the home?

14 A. No, I did not load the BackTrack on those
15 laptop computers. That would be against protocol.

16 Q. So, you don't know if they worked?

17 A. Well, I can see from the evidence seized that
18 he was able to operate those programs. They did work.
19 He had screen shots of them working.

20 Q. But you don't know on which computers, right?

21 A. No. The thing with BackTrack is it is a live
22 operating system, so nothing stays on the hard drive.
23 BackTrack is a live system. It doesn't write to the
24 hard drive. So, all of the files that were retrieved
25 from the thumb drive were taken from there and saved to

1 that thumb drive. They weren't saved to that home
2 computer, to the computer they were used on.

3 You could put a BackTrack CD in any computer
4 in an entire house and there wouldn't be a particular
5 record of that because it is its own self-contained
6 operating system.

7 Q. Okay, but that BackTrack CD is not going to
8 work on every single computer?

9 A. Yeah, it will. BackTrack will boot on -- I
10 don't know a computer it wouldn't work on. As long as
11 you can boot to a CD -- as long as a bios allows you to
12 boot to a CD, you can boot to BackTrack.

13 Q. Now, you talked about the Linux operating
14 system. That is freely available, isn't it?

15 A. Yes.

16 Q. It is used quite frequently, isn't it, as an
17 alternative to Windows?

18 A. I don't know what their market share is.

19 Q. Okay.

20 A. It is not -- it is definitely a lot more -- I
21 don't find it nearly as often as I would find Windows or
22 Mac.

23 Q. Sure. Now, the image that was in the free
24 drive space, if a person clicks on that image, would
25 they be able to display it?

1 A. Yes. Well, like I discussed, on the native
2 operating system, you can't click on it at all, because
3 you don't see it.

4 Q. Right. That is fine. That is my question,
5 thank you.

6 MR. RANK: No redirect, Your Honor.

7 THE COURT: I just have one question. Not in
8 response, necessarily, to any particular question either
9 lawyer asked, and this isn't related -- the purpose of
10 my question -- I will just think out loud for more the
11 benefit of the counsel than you, frankly, than the
12 clients. But, this doesn't relate to special training.

13 I am going to tell you the impression that
14 your testimony has left me with in the context of what
15 you described and what you found at the home of Mr.
16 Ardolf in terms of surveillance and going on the
17 wireless of neighbors, whether the direct victim in this
18 case or not, the impression you have left is that many,
19 many hours over an extended period of time was utilized,
20 as opposed to someone turning on a computer on a Monday
21 evening, and accidentally or otherwise doing the things,
22 you know, maybe 10 minutes here, 10 minutes there, what
23 the impression that you've left on me is, well, we are
24 talking -- whatever is being done, these were many, many
25 hours over an extended period of time.

1 For whatever reason somebody would want to
2 spend all of that time is maybe something between the
3 lawyers, if they think that is relevant; but, is that
4 impression -- is my impression accurate?

5 THE WITNESS: Yes, it is.

6 THE COURT: In light of my question, anything
7 further, Mr. Rank?

8 MR. RANK: No, Your Honor.

9 THE COURT: Mr. O'Brien?

10 MR. O'BRIEN: No, thank you.

11 THE COURT: You may step down.

12 (Witness excused.)

13 Any further testimony? And I will relate
14 this to the issue of the enhancements and the
15 computation under the Guidelines by the United States.

16 MR. RANK: No, Your Honor. I do want to just
17 ask that the Court admit -- I think the Court admitted
18 our exhibits, provisionally, and ask them to be finally
19 admitted.

20 And also ask that the record reflect that
21 standby counsel has had a chance to consult with Mr.
22 Ardolf, and Mr. Ardolf has directed him to ask certain
23 questions and that Mr. Ardolf has no further questions.

24 THE COURT: First of all, Mr. O'Brien, do you
25 need any additional time to consult with Mr. Ardolf as

1 it relates to either anything Mr. Rank has just said or
2 the concluding testimony of the agent?

3 MR. O'BRIEN: May I inquire, Your Honor?

4 THE COURT: Yes.

5 (Discussion off the record between Mr.
6 O'Brien and the Defendant.)

7 MR. O'BRIEN: I have nothing further, Your
8 Honor.

9 THE COURT: Mr. Ardolf, did have you have
10 ample time to speak with Mr. O'Brien? And are you
11 satisfied he asked the questions you were expecting or
12 hoping he would ask?

13 THE DEFENDANT: No. I -- just a couple of
14 questions I still have that are relatively simple.

15 THE COURT: Agent Cameron, I would like you
16 to retake the stand, if you would, please?

17 And then, Mr. Ardolf, I would like you to
18 just step -- after the Agent gets on the stand, and I am
19 not asking for -- note the objection of the Government
20 if you have one, but I am going to proceed.

21 Do you want to come over to the podium, Mr.
22 Ardolf? Go ahead and ask the questions.

23 RE CROSS EXAMINATION

24 BY DEFENDANT ARDOLF:

25 Q. Agent Cameron, can you determine which

1 computers from the Ardolf house was used for the
2 attacks?

3 A. I can determine where the files were found.

4 Q. Thank you. Can I take that as a no? Yes or
5 no. Can you determine which computer was used? Yes or
6 no.

7 Have you determined which computer was --

8 A. Yes.

9 Q. You have. Which one?

10 A. We have -- well, there was the desktop where
11 several items of evidence were found, and then there was
12 the laptop, at least the other laptop. And then
13 evidence was found on at least, I think, five or six
14 different machines.

15 Q. I am not talking about the evidence. So, you
16 are telling the Court which computer was used, for sure?

17 MR. RANK: I am going to object on vagueness
18 grounds.

19 THE COURT: If you understand the question,
20 you may answer it. If you don't, you should say so,
21 Agent.

22 THE WITNESS: Yeah, I don't understand the
23 question.

24 BY DEFENDANT ARDOLF:

25 Q. How can a person determine which computer was

1 definitely used?

2 A. Oh, well normally, you would use the media
3 access control number, the Mac number --

4 Q. Did you do that?

5 A. -- but your computer was running Mac changer.
6 So if you change your MAC address using Mac changer,
7 which was operational when we did the search warrant,
8 then you would be able to change the MAC address of the
9 attacking machine anytime you wanted, which would make
10 the Mac number irrelevant.

11 Q. And what computer was running the Mac
12 changer?

13 A. Your desktop computer in your bedroom.

14 Q. And did that MAC address coincide with one
15 that was recorded?

16 A. Well, as I stated, if you are using Mac
17 changer, it doesn't matter what the MAC address is.

18 Q. And directions for cracking WEP are usually
19 found on the worldwide web. You testified to that, I
20 believe?

21 A. Yeah. You can find those directions on the
22 worldwide web.

23 Q. The MySpace picture, in addition to the Court
24 redaction, were there additional redactions made to that
25 picture? White scribbling? Mr. Rank pointed out

1 someone had to open it up in kind of a paint program
2 to --

3 A. Right, you can use paint to do that.

4 Q. Did you positively identify those, that
5 picture, as child porn?

6 A. Yes, that was the same image.

7 Q. How did you positively identify it as the
8 same picture?

9 A. Well, we can bring them up. There are
10 several things -- they are the exact thing images.

11 Q. So, it was visually, not forensically?

12 A. Well, MD5sums which are used to enumerate
13 files --

14 Q. Did you use that?

15 A. -- they can be different once they're
16 altered.

17 Q. So, you cannot confirm that that was the
18 second picture?

19 A. I can look at it and say it is the same
20 picture.

21 Q. When you set up a router, when you buy one
22 new out of the box, in order for it to be encrypted,
23 someone has to input a password; is that correct?

24 A. It depends on what model you buy. A lot of
25 them will come prepackaged with encryption. They will

1 say this is your key. If you want to change it. You
2 can log in and change it. Some are that way, some you
3 need to set a password and configure more. It depends
4 on what brand you buy.

5 Q. And in general, most all brands, there is a
6 website you can go to to find out what the general WEP
7 key is for people who forget what it is?

8 A. There is not a general WEP key available.
9 There is a general password. If they don't set the
10 password manually, some of the older routers do have
11 default passwords.

12 THE DEFENDANT: Okay, thank you. That is
13 all.

14 THE COURT: Mr. Rank?

15 MR. RANK: Quickly, Your Honor.

16 REDIRECT EXAMINATION

17 BY MR. RANK:

18 Q. Agent Cameron, Mr. Ardolf asked you about Mac
19 changer. Is that something that is part of that
20 software suite that is on BackTrack?

21 A. Right.

22 Q. Particularly, what does Mac changer allow
23 someone who is running BackTrack to do?

24 A. It allows you to run your wireless MIC MAC
25 address, which means that each wireless card has its own

1 physical MAC address that is kind of embedded into it
2 out of the factory. But, with Mac changer you can
3 address that MAC address and change it to another
4 number.

5 Q. So somebody that is running Mac changer has
6 to know that their computer, if they are going to try to
7 talk to a wireless router, that they are going to be
8 identified with a MAC address, right?

9 A. Right. Each connection to the MAC address is
10 going to be transmitted in that packet.

11 Q. And if you wanted to disguise your contacting
12 of that wireless router, that is the purpose of running
13 MAC changer?

14 A. Absolutely, so they wouldn't be able to
15 attribute it to your MAC address.

16 Q. So, you would have to know, first of all,
17 that each computer has a unique MAC address, right?

18 A. Right.

19 Q. So, somebody who is more knowledgeable about
20 computers would know that about the MAC address?

21 A. Right.

22 Q. And you would also have to know that there is
23 a device that you could use to spoof the MAC address, to
24 hide behind a fake MAC address, right?

25 A. Right.

1 Q. And you also have to know that the router
2 would be recording MAC addresses of the various
3 computers that would use that router; is that also
4 correct?

5 A. Right.

6 MR. RANK: Thank you, Agent Cameron. No
7 further questions.

8 THE COURT: Mr. Ardolf or Mr. O'Brien?

9 RE CROSS EXAMINATION

10 BY DEFENDANT ARDOLF:

11 Q. You had said that you had cracked WEP
12 yourself?

13 A. No, I didn't.

14 Q. You've never practiced?

15 A. No.

16 Q. Did you learn how to do it?

17 A. Well, I am aware of how it is done. I don't
18 have a reason to practice.

19 Q. You are aware of how it is done. Okay. Are
20 you aware that on the web, on YouTube, there are many
21 videos on how to crack WEP in less than a minute?

22 A. Yeah, I am aware of that.

23 Q. Okay, thank you.

24 MR. RANK: Nothing further.

25 THE COURT: Mr. O'Brien?

1 MR. O'BRIEN: I have no questions, Your
2 Honor.

3 THE COURT: You may step down, Agent Cameron.
4 (Witness excused.)

5 THE COURT: Separate -- okay, I guess we left
6 off with moving the admission, unprovisionally, of the
7 exhibits. That is where I left off with Mr. O'Brien
8 before I had Mr. Ardolf complete the questioning.

9 Mr. O'Brien?

10 MR. O'BRIEN: I will consult, Your Honor.

11 THE COURT: All right.

12 (Discussion off the record between Mr.
13 O'Brien and the Defendant.)

14 MR. O'BRIEN: No objection, Your Honor.

15 THE COURT: Those exhibits are received.
16 Other than additional argument on the guideline
17 computation in terms of what the advisory guidelines
18 are, any further questions on that issue for the
19 Government?

20 (Government's Exhibits 3, 4, 6, 7, 8, 9, 10,
21 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 23, 24, 25, 26,
22 27, 28, 29, 30, 37, 44, 45, 50, 51, 52, 53, 54, 55, 56,
23 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 73,
24 74, 75, 76, 77, 78, 79, 80, 85, 86, 87, 88, 89, 90, 91,
25 154, 155, 160, 161, 162 and 163 were received into

1 evidence.)

2 MR. RANK: No, Your Honor.

3 THE COURT: Mr. O'Brien, on a separate issue
4 of the Guideline computations, separate from argument
5 which we will probably go to shortly, any additional
6 evidence or testimony other than, of course, the
7 position pleadings both parties have filed and any oral
8 argument that we are about to proceed with?

9 MR. O'BRIEN: No, Your Honor.

10 THE COURT: Well, since there are objections
11 of the Defense, you had said at the beginning of the
12 hearing, Mr. O'Brien, on this issue, you believed that
13 you would cover those objections with the permission of
14 Mr. Ardolf, as opposed to maybe the issue at the end of
15 whenever a defendant gets to address the Court,
16 regardless of the attorney status, on what is important
17 for me to know and what is a fair and appropriate
18 sentence. But, on the issue of the objections that have
19 been filed, do you wish to address the Court, assuming
20 it is with the permission which I will verify with Mr.
21 Ardolf?

22 MR. O'BRIEN: If I may, Your Honor --

23 THE COURT: Before you do that, do you
24 believe you have the permission of Mr. Ardolf?

25 MR. O'BRIEN: I will check.

1 THE COURT: Well, I can just ask him. When
2 we started the sentencing hearing, I said the first
3 phase would be after the testimony sentencing was done,
4 I would hear separate legal argument on the objections
5 that were filed to the probation officer's computations
6 under what the advisory guidelines are, which include
7 also one issue of consecutive versus the two-year
8 mandatory minimum.

9 It looks like there is -- but I understood
10 you to say, Mr. Ardolf and Mr. O'Brien, that on that
11 issue, that he had your permission to address those
12 objections that he filed in a 20-page plus position
13 memorandum that had been filed.

14 Does that remain the case?

15 THE DEFENDANT: Yes, Your Honor, that is
16 correct. I do need to use his legal advice.

17 THE COURT: All right. And I will check in
18 with you and have Mr. O'Brien consult with you after he
19 makes any additional argument.

20 Now, there are two ways we can do this. And
21 I will defer somewhat to counsel. We can take these as
22 a group, and we will proceed with your argument, or we
23 can take the ones most important to you, Mr. O'Brien.
24 We will go forward with your -- any argument, or we can
25 take them as a -- I probably would prefer, unless one of

1 you thought it was unfair, to have you go right through
2 your objections, and lead me with what -- noting again
3 you both submitted extensive memoranda, so if someone in
4 the gallery is thinking, well, with all of the testimony
5 we have taken, there wasn't a lot of extensive oral
6 argument. Well, there have been 20-page plus briefs
7 filed by both parties.

8 But, unless there is an objection to that
9 procedure, I will just have you, Mr. O'Brien, address
10 each of the objections you have made. Or if you say,
11 well, it would be more manageable for me if I group two
12 or three of the most important, address those, then hear
13 from the Government and then move on, and if you want me
14 to rule on a few as we go, I will do that.

15 MR. O'BRIEN: Your Honor, I am prepared just
16 to go forward and review all of them and then wait for
17 the Court's ruling.

18 THE COURT: Is that agreeable with the United
19 States?

20 MR. RANK: That is acceptable.

21 THE COURT: I will hear from you, Mr.
22 O'Brien.

23 MR. O'BRIEN: Your Honor, just so we
24 understand, I am not going to make any further argument
25 about the number of images. I believe that there are

1 nine, though, not ten, because of the one that was
2 deleted and not capable of being seen by Mr. Ardolf, not
3 being capable of being transmitted, I don't think it is
4 proper to give the two-level enhancement under
5 2G2.2(b)(7).

6 THE COURT: All right.

7 MR. O'BRIEN: As far as the special skills,
8 Your Honor, I am going to stand on the testimony of
9 Agent Cameron and not offer any further argument.

10 THE COURT: And in fairness to you and the
11 Government, you addressed it at some length in the brief
12 that was submitted to me, as well. So, all right?

13 MR. O'BRIEN: Although, we -- for the record,
14 we continue to object to the two-level enhancement for
15 special skills.

16 THE COURT: Yes, you do and I will rule on
17 that once we are done, here.

18 MR. O'BRIEN: Your Honor, I think the Court
19 is aware -- I know the Court is aware of what the image
20 in question is.

21 THE COURT: I looked at them. That is my
22 practice in every case where there is child pornography.
23 I have looked at them.

24 MR. O'BRIEN: And I have addressed the issue
25 of the four-level enhancement under 2G2.2(b)(4), given

1 the nature of the image. And I don't think the
2 four-level enhancement is appropriate. I don't think we
3 need any further argument than what has been submitted
4 to the Court already.

5 THE COURT: Well, I mean, and having due
6 regard for the fact that we are in a public courtroom,
7 we might as well put the issue out there. Because it is
8 in both of your briefs that you have filed, and that is,
9 it is -- one, it is the -- is it Savon? Is that the
10 right -- it is a common child pornography -- in other
11 words, this is showing up in a lot of child pornography
12 cases, which I suggest this isn't primarily a child
13 pornography case. But, we will get to that at
14 sentencing, my sentencing decision.

15 And so, it is a common site that ends up -- a
16 lot of people get access to it. But, let's just say
17 what it is so we understand the argument. It is two
18 males and a female, it is clear -- I can give you my
19 opinion, that on the whited out face, that obviously was
20 whited out on the MySpace but was not when it was sent
21 to Moss & Barnett.

22 I have the opinion it is the same. It is the
23 same picture. It is three juveniles. And one juvenile
24 has his penis in the mouth of the female, and she is
25 also holding the penis of the other male. So, we might

1 as well have it out, there. I could use phrases like
2 orally penetrating, but let's just say what the issue
3 is, and I say it with all due respect to all those
4 involved and the three laying on the bed there. And it
5 is your view that, one, it doesn't fit the definition of
6 sadistic masochistic. And one primary argument, not the
7 only one, well, it might be a closer call or decision if
8 it was an adult male that was involved with the female
9 and the other juvenile, but it is three juveniles. I
10 mean, I don't want to oversimplify your concerns, but
11 that is one of the arguments you both addressed; is it
12 not?

13 MR. O'BRIEN: It is, Your Honor. And there
14 isn't the typical signs of sadism in that picture.
15 Child pornography is not necessarily sadistic, as
16 reprehensible as it is. There was no bondage. There
17 was no violence. There was no accessory typically
18 associated with sadism, no attire, so as reprehensible
19 as it is, I don't believe it meets the definition of
20 sadism, which I think has an objective definition. At
21 least the Second Circuit says it does. And I think that
22 is a wise decision.

23 I don't think it is akin to the definition of
24 pornography that -- well, I know it when I see it. I
25 think there have to be certain elements there. And I

1 don't think they are present. But, that is what I had
2 to say about that proposed enhancement, Your Honor.

3 THE COURT: All right.

4 MR. O'BRIEN: Your Honor, the PSR recommends
5 that Mr. Ardolf receive no points -- point reduction for
6 acceptance of responsibility under Sentencing Guidelines
7 3E1.1. If I could just address that briefly, Your
8 Honor?

9 Mr. Ardolf wrote an acceptance statement.
10 And that starts with an apology not only to the victims,
11 it is to his family, to the Court, and specifically to
12 his children. And they just have to be mortified by
13 this. And this case is very difficult for them.

14 Mr. Ardolf knows that he let them down, that
15 he was the only parent that they had, and he acted in a
16 way that really was just horrible to them. I know that
17 there was a real issue as to the timing of that
18 statement.

19 I believe that Mr. Ardolf is sincere. He has
20 had over a year in the Sherburne County Jail to think
21 about what he did. He has now had the benefit of having
22 counseling with a priest. I think he probably has a
23 closer relationship with his attorney than he did
24 before. I think he is seeing some insight into his own
25 behavior.

1 I know the Court when it -- when the Court
2 sentences convicted people, the Court sentences people
3 for what they have done wrong, not for who they are.
4 And in the Government's paper I see a little bit of the
5 opposite, that Mr. Ardolf is a dangerous man. This man
6 must be punished to the extent of the law, the greatest
7 extent of the law. And I don't think that that is the
8 appropriate philosophy. There are a number of bad
9 things that Mr. Ardolf did, and one of them, probably
10 the most egregious, was sending the child pornography.
11 And this is going to be the factor which really drives
12 these Guidelines.

13 THE COURT: That is true in many ways.

14 MR. O'BRIEN: And we are getting to some very
15 high levels in the Guidelines. And I know the Court
16 will sentence Mr. Ardolf for the bad things that he has
17 done, knowing that Mr. Ardolf, like everyone in this
18 courtroom, has some positive characteristics. He is a
19 flawed man, in some ways, but you can't read the letters
20 from his children and from his friends. And you can't
21 see the pictures of his family and conclude that he is a
22 dangerous, bad man. He is a man that did bad things.
23 And I would ask --

24 THE COURT: What should I do, Mr. O'Brien,
25 with less than a few months ago, as both the letters

1 sent to me by Mr. Ardolf, and it happened in the open
2 courtroom, Mr. Ardolf not only explained to me that he
3 was coerced into the plea, and not only said he was
4 innocent. But, when he said that, he then said and the
5 victims targeted me. I have been framed by the victims
6 in this case. That is very specifically what he said,
7 both in the letter to me, and in this courtroom.

8 So, in other words, you are saying -- I'm
9 quite certain Mr. Rank is going to get up and say, I
10 should reject the notion that this, with or without the
11 assistance of a clergy, is sincerely stated today
12 because this isn't just somebody who has admitted their
13 guilt. But, they were targeting less than a few months
14 ago the victims, the very victims that he terrorized for
15 a long, long time.

16 What should I do with that?

17 MR. O'BRIEN: Mr. Ardolf for a period of
18 time, and even now he is attorney of record and I am
19 standby counsel, but I am obviously recognizing more of
20 the role of attorney than I was at that point, Your
21 Honor.

22 THE COURT: And Mr. Ardolf will get a chance
23 to say what he wants to say before we get to the end of
24 this, so --

25 MR. O'BRIEN: But my point, Your Honor, is I

1 explained to Mr. Ardolf what the elements were that he
2 had to establish in order to prevail in a motion to
3 withdraw his guilty plea. And I told him one of the
4 elements is you have got to have a credible claim of
5 innocence. And we discussed that. And I think his
6 statements as to possible, reasonable doubt pointing to
7 other people having done these acts was a fruit of that
8 thought.

9 I also think, Your Honor, that Mr. Ardolf's
10 thinking has changed. And he is going to address the
11 Court. And I can assure the Court that he is not going
12 to be blaming anybody, other than himself.

13 THE COURT: I think I interrupted you. You
14 had gone from acceptance and I don't know -- so I don't
15 know, I think I interrupted you.

16 MR. O'BRIEN: Well, I said what I wanted to
17 say to the Court about acceptance, Your Honor.

18 THE COURT: All right.

19 MR. O'BRIEN: And one of the issues that
20 remains is the proposed two-level enhancement for
21 obstruction of justice under Guidelines 3C1.1.

22 As I understand the Government's submission,
23 that enhancement to the Government is warranted based on
24 letters that were sent from Mr. Ardolf to his son,
25 supposed false testimony at the suppression hearing, and

1 then his false denial of guilt at his motion to withdraw
2 his guilty plea.

3 The Government's submission also references
4 the fact that in my submission, Your Honor, I referenced
5 only a portion of the letter that Mr. Ardolf wrote to
6 his son.

7 The reason I only cited that portion was
8 because that was the only portion that was listed in the
9 PSR. So, there was no attempt on my part to hide
10 anything or to keep the Court from making rulings based
11 on a complete record.

12 But, I think that reviewing the exhibits that
13 the Government has offered today, being the letters
14 between the Ardolf family, I don't think these amount to
15 obstruction, Your Honor. And I don't think the case law
16 supports it. And I tried to send the Court what I
17 thought was a sampling of case law that establishes what
18 has to be -- what has to occur in order for obstruction
19 of justice to be attributed to a defendant.

20 As far as the letters to his son, Your Honor,
21 these are replete with chores that have to be done and
22 how this man is going to -- this young man, 18 years
23 old, is going to be the head of household and run a
24 house. And there were some references, yes, to
25 testimony. And I believe that Mr. Ardolf's son has no

1 relevant testimony that would have been offered at a
2 trial.

3 Yes, he may have been on a witness list. I
4 don't think there is a lawyer here that would have put
5 him on the stand. It is simply irrelevant what took
6 place on August 2nd and August 3rd of 2008.

7 Now, it explains future acts done by Mr.
8 Ardolf. It was the catalyst for these acts that took
9 place. But, what happened there is really irrelevant to
10 the crimes that he committed. It is not part of any
11 element of any of the six crimes that he was convicted
12 of.

13 THE COURT: What about in the one letter
14 where he laid out the questions and answers for the
15 testimony of what his son should testify to and what
16 exactly he should say?

17 MR. O'BRIEN: This is what I am told about
18 that, Your Honor, and it makes sense to me. He said --
19 Mr. Ardolf said that, well, I had a recollection of what
20 happened. I anticipated that my son would be asked
21 these questions. I wrote him with the questions I
22 thought he would be asked, and what I thought his
23 answers were based on what he had told me.

24 Importantly, Your Honor, Mr. Ardolf's son
25 wrote back and said, no, that is not what happened.

1 This is what happened. These are the answers. I don't
2 think that Mr. Ardolf was attempting to elicit false
3 testimony, wasn't trying to suborn perjury. He was just
4 trying to prepare his son for possible testimony. And I
5 don't think there is anybody -- any lawyer in this room
6 that hasn't prepared a client or a witness for court
7 testimony. So, that is how I view that, Your Honor.

8 THE COURT: All right.

9 MR. O'BRIEN: As far as Mr. Ardolf's
10 testimony at the suppression hearing, his false,
11 supposed false denial of guilt -- it wasn't a false
12 denial of guilt at his plea withdrawal hearing, Your
13 Honor.

14 The Guidelines specifically reference the
15 limitations on the use of the enhancement in application
16 note 2 of 3C1.1, which specifically says that the
17 provision for obstruction is not intended to punish the
18 defendant for the exercise of a constitutional right. A
19 defendant's denial of guilt, other than a denial of
20 guilt under oath that constitutes perjury, refusal to
21 admit guilt or provide information to a probation
22 officer or refusal to enter a plea of guilty is not a
23 basis for application of this provision.

24 In applying this provision in respect to
25 alleged false testimony or statements by the defendant,

1 the Court should be cognizant that inaccurate testimony
2 or statements sometimes may result from confusion,
3 mistake or faulty memory, and thus not all inaccurate
4 testimony or statements, necessarily, reflect a willing
5 attempt or willful attempt to obstruct justice. I don't
6 think that the testimony at the suppression hearing or
7 what Mr. Ardolf put in his motion to withdraw his plea
8 constitute acceptance given the application note's
9 guidance.

10 So, Your Honor, we are left now with the
11 issue of the aggravated identity theft and the
12 application of 18 U.S.C. 1028A. And I referenced that
13 in my position paper and it is a rather technical
14 argument. But, I read 1028 to say that not every
15 incident of identity theft is aggravated.

16 And if it is not aggravated, then the
17 consecutive two-year sentences are not applied. I think
18 what makes it aggravated is, as I read the statute, is
19 if the offense was done in relation to one of the
20 offenses which is enumerated in 1028A, and particularly
21 1028A(c).

22 Now, the PSR cites Count 1, Count 1 which is
23 a violation of 18 U.S.C. 1030A as the enumerated
24 offense. But, Your Honor, as I read the elements of 18
25 U.S.C. 1030A, I don't see fraud. I mean, I see that

1 that is a statute that prohibits the intentional access
2 of a computer without authorization, or exceeds the
3 authorized access, and therefore obtains certain
4 information. Information obtained in a financial record
5 of a financial institution, or in a consumer reporting
6 agency, information from a department or agency of the
7 United States -- you know, Mr. Ardolf pled guilty to
8 that. And so I -- it is a moot point that he really did
9 this.

10 But, I don't see how the facts of what
11 happened on February 22nd, 2009, established these
12 elements. But, in any event, Your Honor, these
13 elements, to me, are specifically not related to fraud.
14 And this is the -- that is the language under
15 1028A(c)(4) that the Government and the Probation Office
16 is using to establish that the aggravated identity theft
17 was committed in relation to another offense. And I
18 don't think that the offense that they listed has an
19 element of fraud or false statements.

20 I know the Government says: Well, wait a
21 minute. A clear reading of 1030, 18 U.S.C. 1030 says
22 that it is fraud. But, it says fraud and related
23 activity in connection with computers. So, I think that
24 that is a limiting definition. And I think in this case
25 that use of 18 U.S.C. 1030 as an enumerated offense to

1 establish the predicate offense for the aggravated
2 identity theft is not appropriate.

3 So, I am left, Your Honor, with a
4 calculation, a base offense level of 22, enhanced by two
5 levels for depiction of a prepubescent minor, two levels
6 for distribution of child pornography, two levels for
7 use of a computer.

8 If the Court grants Mr. Ardolf the two-level
9 reduction for acceptance of responsibility, that leads
10 to a guideline sentence of 78 months to 97 months. No,
11 without the acceptance, it is 78 to 97 months. And then
12 if the Court grants his two-level reduction for
13 acceptance of responsibility, the guidelines sentence is
14 63 to 78 months.

15 As far as the supervised release, I know the
16 Government is requesting the maximum.

17 THE COURT: Why don't we -- why don't we save
18 that for any separate argument? I will go ahead and
19 make the findings once I hear from Mr. Rank on the
20 Guidelines.

21 And then if you and Mr. Ardolf want to be
22 heard on, well, that may be what the Guidelines say, but
23 here is what we are asking you to do today as a fair
24 sentence in the case. So --

25 MR. O'BRIEN: Sure, Your Honor. Thank you.

1 THE COURT: Is that acceptable to you, Mr.
2 Ardolf?

3 THE DEFENDANT: Yes.

4 THE COURT: All right.

5 MR. RANK: Thank you, Your Honor. Your
6 Honor, I will address the objections in the order that
7 Mr. O'Brien did for the benefit of the Court. First of
8 all, he did not address the number of images
9 enhancement. What is clear here, Your Honor, is that
10 the image --

11 THE COURT: He did say it was nine, not ten.

12 MR. RANK: Right. And I think the exhibits
13 presented in court today and also the explanation about
14 what those exhibits meant indicate that the number of
15 images should be ten in this case.

16 The argument that somehow one of those images
17 was erased or deleted at one point in time doesn't
18 undermine the fact that it was possessed at one time.
19 And the Guidelines and the relevant conduct under the
20 Guidelines talks about possession at any time.

21 I know counsel in his papers tried to say:
22 Well, there should only be images that were related to
23 the transmission offense and not the possession offense.
24 But, the case law is quite clear for relevant conduct
25 purposes, it is all of the images. And there are a

1 number of cases out there that talk about both,
2 possession and trafficking offenses, and looking at all
3 of them combined.

4 To say that because there had been an attempt
5 to delete one of the images at the time the search
6 warrant was executed doesn't undermine the fact that Mr.
7 Ardolf possessed that image at one point in time on that
8 computer.

9 It is not an artifact, it is not created as a
10 result of some other file he had saved on there. It was
11 a unique computer that none of the other images were
12 stored on. So, based on that, there is no question, and
13 Agent Cameron testified about this, that it meant that
14 he possessed all of those images at one time. All of
15 those images are images that were used in the offense.

16 The case law is also clear that every
17 electronic version is an image for the purpose of
18 counting and the number of images. So I think that
19 argument, Your Honor, does not have legs.

20 With respect to the special skills
21 enhancement, Your Honor, I will rely on what the United
22 States has submitted in its written materials to the
23 Court. I think it is clear based on the information
24 that Agent Cameron presented today, that this was
25 something that took some background, and certainly Mr.

1 Ardolf's computer background aided his ability to
2 execute the hack and all of the related attacks in this
3 case, Your Honor. I think the special skills
4 enhancement, no question, applies.

5 Your Honor, with respect to the issue with
6 regard to the sadomasochistic or sexual violence
7 enhancement, I think the *Bellflower* case, which is cited
8 in the Government's memorandum, is the best case on
9 that. And it talks about the applicability of this
10 enhancement when there is any penetration, in this case.
11 And to distinguish in some way between an adult doing it
12 and a child doing it or one of the other children doing
13 it, there is no basis for that distinction.

14 This wasn't a voluntary act by these children
15 represented in the Savon Series photographs, Your Honor.
16 As the Court is aware and as the investigators are
17 aware, these kids were abused over a period of time,
18 sexually abused, and there were pictures taken of those
19 children. It wasn't their idea to engage in that sexual
20 conduct. They were posed by adults. And the fact that
21 they were posed by adults doesn't make it any better
22 than if an adult was committing that act of violence on
23 them. Forced sex, non-consensual sex between children
24 is a violent act. And the *Bellflower* case talks about
25 all the reasons why it should be considered a violent

1 act, and therefore a depiction of sexual violence that
2 deserves the enhancement.

3 Your Honor, Counsel's -- I guess I am a
4 little surprised that we are hearing any argument on
5 acceptance of responsibility. I think the possibility
6 of an acceptance of responsibility reduction in this
7 case is preposterous. This is a person who has never
8 accepted responsibility. And I have to say that given
9 the sort of eleventh hour drafting of a written document
10 called -- or for it to be an acceptance of
11 responsibility document is nothing but a bald attempt to
12 get a break on the defendant's sentence, further
13 manipulation that is consistent with other attempts at
14 manipulation by the Defendant both before and after he
15 became part of the court system.

16 Mr. O'Brien has said that there is a
17 distinction between what the Court should do in
18 sentencing somebody for their actions and sentencing
19 somebody for who they are. And I think that is a false
20 construct, Your Honor. I know that in State Court there
21 is a distinction between dispositional departures and
22 durational departures and you are supposed to sentence
23 the conduct and not the person. That is not true in
24 Federal Court. 3553(a) says exactly that that is a
25 relevant issue in determining what the Court should do

1 with respect to sentencing. In fact, it is the sole
2 reason the Defendant is submitting photographs and
3 letters, because he wants you to think things about him
4 as a person.

5 This case, Your Honor, though, shows in the
6 actions of the Defendant, his conduct in this case, both
7 before and after he was caught, both before and after he
8 became part of the criminal justice system demonstrate
9 the kind of person he is. And the argument that Mr.
10 Ardolf is now accepting responsibility after initially
11 declining to plead guilty, after violating -- blatantly
12 violating the terms of his pretrial release after -- and
13 I believe the record is clear, lying during the
14 suppression hearing, a finding by Magistrate Judge Noel
15 that he gave testimony that was not credible. That is
16 report and recommendation language for he lied during
17 his testimony, adopted by this Court afterwards. And I
18 think in looking at the transcript of that, there is no
19 question that Mr. Ardolf was lying in a calculated way
20 in order to obtain a suppression of the statement that
21 he gave to law enforcement.

22 The coaching of his son through the letters,
23 and the Court can look at the letter that is referenced
24 in the Government's brief which contains the directions
25 on how to testify, as well as the script of how to

1 testify. In the context of everything, I don't believe
2 that that is a credible explanation of why that was
3 being done.

4 But, lastly, Your Honor, the statements by
5 Mr. Ardolf in connection with his Motion to Withdraw his
6 Guilty Plea are probably the best evidence of the
7 non-acceptance of responsibility. And I know there is
8 case law that says it is possible to get acceptance of
9 responsibility reductions if somebody does plead during
10 the middle of trial, it is within the Court's
11 discretion, certainly. But, when someone thereafter
12 moves to withdraw their plea, they take away that
13 acceptance. They require us to have extensive hearings
14 on it, to brief the issue, to go back and scour the
15 transcript and go through all of the things told to Mr.
16 Ardolf about, is this your choice to be doing this, sir?
17 And then to have him testify under oath that he did all
18 of the stuff, all of the allegations in the indictment,
19 which of course he was doing as a tactical choice to
20 better his position, to do that, and then a couple of
21 months later say, yeah, I was lying during that under
22 oath testimony before you, Judge. I am going to file a
23 motion -- and it wasn't just a motion he filed on a
24 whim. He had a hearing.

25 Your Honor pointed out to him the transcript

1 saying, you know, you were advised of all of these
2 things and you testified under oath. He got advice from
3 counsel on what it meant, and also, apparently, got
4 advice from counsel on what standard, what thing he had
5 to say in order to get the Court to grant his motion to
6 withdraw his guilty plea, to falsely assert that he was
7 in fact innocent. So, he looked at that and said, I am
8 going to falsely assert that I am innocent in a way to
9 manipulate the process.

10 And now he writes a two-page letter in which
11 he actually indicates that the reason that he did this
12 stuff is because he felt victimized. And I will tell
13 you, Counsel says I believe he is sincere, that is what
14 Mr. O'Brien said, stood up here and said that.

15 Your Honor, I don't believe he is sincere.
16 And my opinion may not be worth much in the context of
17 things, but if Mr. O'Brien is going to offer his, I will
18 offer mine. I don't believe he is sincere. I believe
19 this is further manipulation or attempted manipulation
20 of the case and doesn't even come close to representing
21 acceptance of responsibility.

22 It dovetails, Your Honor, with my response to
23 the arguments on obstruction of justice. I think there
24 are ample reasons for the Court to determine that Mr.
25 Ardolf obstructed justice in connection with this case.

1 They are all listed out from the lying at the
2 suppression hearing, to the coaching of his son in what
3 his trial testimony -- what he hoped his trial testimony
4 would be, to the coaching of his children on how to
5 write the letters to the Court on how they should --

6 THE COURT: And his sister?

7 MR. RANK: And his sister, to the false
8 assertions of innocence. All of those, Your Honor, each
9 one, any one of -- pick one of those four, could be an
10 adequate basis for an obstruction of justice
11 enhancement. All of them together make it overwhelming
12 and make it so that it is manifest that the obstruction
13 of justice applies.

14 And lastly, I am again a little perplexed
15 that counsel is pursuing the aggravated identity theft
16 argument. I think that the statute is so absolutely
17 clear on its face that a predicate offense for an
18 aggravated identity theft violation is a 1030 violation.
19 It is, it is clear under a plain reading of the statute,
20 and it is clear because even if there was some sort of a
21 requirement that -- even if the fraud and false
22 statements reference in 1028A(c), which lists out the
23 predicate offenses, which says in this chapter, and then
24 in parentheses, brought in false statements, which of
25 course is the title of the chapter. Even if there was

1 an additional element that we show fraud, computer
2 intrusion is fraud. It is lying to get access into
3 something. It is providing false information to a
4 router to get access to it. And that is precisely, Your
5 Honor, why 18 U.S.C. 1030 is called the Computer Fraud
6 and Abuse Act. Because hacking into and intruding
7 computers requires an element of falsity, of fraud,
8 providing false information in order to get access to
9 that information.

10 So, I don't think it is necessary that we
11 show that there is fraudulent conduct that takes place
12 there. I think it is a plain reading of the statute
13 shows that any 1030 violation is a predicate offense
14 under 1028A. And in light of the Sentencing Guidelines
15 in this case, I think it is relevant because I think we
16 ought to be looking at the floor of the sentence in this
17 case, which is seven years.

18 In light of the Guidelines and what I think
19 is the appropriate sentence in this case, I think we are
20 going to be well above that, and I hope to see the
21 sentence here to be well above that seven-year floor.

22 THE COURT: By floor, you are saying a
23 five-year minimum on the distribution charge, and a
24 two-year mandatory minimum, as you have alleged,
25 consecutively, on the -- that the floor, just on, apart

1 from the Guidelines, really, the mandatory minimum is
2 seven years.

3 MR. RANK: I think that is correct, Your
4 Honor. A mandatory minimum of five years on the
5 distribution, plus two for the aggravated identity
6 theft. There are permissive consecutive sentences --

7 THE COURT: Well, there is permissive, but
8 you are saying, as a minimum, if I accept the
9 Government's argument, we start at seven years,
10 irrespective of what else happens today.

11 MR. RANK: I think that is exactly right.

12 THE COURT: And I suspect that Mr. O'Brien
13 will concede the five years, but not the seven.

14 MR. RANK: That is correct. Let me just
15 check with Counsel. I think that is everything, Your
16 Honor.

17 (Discussion off the record.)

18 Ms. Heino, did I miss anything?

19 THE PROBATION OFFICER: (Shaking her head in
20 the negative.)

21 MR. RANK: Thank you, Your Honor.

22 THE COURT: Any rebuttal, Mr. O'Brien? Did
23 you want to chat with Mr. Ardolf? Keeping in mind the
24 argument on what is a proper sentence is not before me
25 right now. I am just going to make the findings, the

1 legal objections on the Guidelines, and then we will go
2 to final argument, and any statement from the victims
3 on, well, regardless of what the Guidelines say, here is
4 what we say on both sides, so --

5 MR. O'BRIEN: I don't have anything further
6 on the Guidelines, Your Honor.

7 THE COURT: All right. What I will do is I
8 will go ahead and make the rulings. And for the people
9 less experienced with the court system, what is required
10 in every case is the Judge is to, separate from what are
11 commonly called the 3553(a) factors that state: Well,
12 here are the guidelines, advisory guidelines, and there
13 is a separate issue of mandatory minimums where Congress
14 steps in and says, well, irrespective of what the
15 Guidelines say, if someone pleads to this as found by
16 the Court, here is the mandatory sentence the Judge must
17 impose. So that there are one or two of those in play
18 here. Then there is permissive or discretionary
19 consecutive sentences on different counts, that is up to
20 the Court.

21 But, first, I will address -- make a ruling
22 on each of these which both parties are entitled to, and
23 then I will decide whether or not there should be -- I
24 am not going to take a noon break, but then we will
25 decide whether we go straightforward with final argument

1 on the sentence and I will impose it, or we take a short
2 break. I will check in with my Court Reporter after we
3 make these rulings, because I am amenable to either one.

4 So, I will first take the objection -- I will
5 just take them in, not necessarily the order in which
6 they were argued, but for ease of my notes and
7 decision-making, I will take them in the order in which
8 they were laid out and objected to by the defense in the
9 presentence report. And that report -- and of course I
10 take into account the position pleadings and the
11 arguments today.

12 The first one is the enhancement for
13 obstruction of justice, which is a two-level enhancement
14 as the Guidelines refer to it. First of all, both on
15 this issue and acceptance, because there is one thing
16 they have in common, the -- whether the testimony at the
17 suppression hearing was truthful or untruthful, and it
18 was found as untruthful by the Magistrate, that plays no
19 part in my rulings on either one.

20 So, whether I assume that the testimony was
21 truthful, or that Mr. Ardolf was exercising his
22 constitutional right to put up a defense, or it was
23 untruthful, my decision is the same on both. First of
24 all, I really have no reluctance in finding -- noting
25 the strong objection of the Defense -- an enhancement

1 for obstruction of justice, quite separate from any
2 pretrial testimony.

3 I base that on, one, the tone and the nature
4 of the letters to the son, to the sister, insistence
5 that I am going to proofread anything you send in, so
6 send it to me first. And one phrase, keep to my story.
7 I don't really think it did relate to the incident with
8 the victims, with their child on the front lawn of their
9 house. So I have no reluctance in, apart from that --
10 in addition to that, the notion of coming in, and I will
11 get to acceptance in a few moments of acceptance of
12 responsibility, and targeting the victims saying, not
13 only am I innocent, but they did it. They framed me, so
14 I don't believe that -- and I say it respectfully, that
15 Mr. Ardolf was truthfully -- and this will come up again
16 for final sentencing, but there is so much sadness in
17 this case.

18 For example, a statement for the record in
19 Exhibit 161. And one of the shining lights in Mr.
20 Ardolf's life, and she must have been a very special
21 woman, his wife and the mother of his children, yet on
22 page 2 of this exhibit, he is writing to his son. You
23 can cry about how you lost your mother. You can cry on
24 losing your dad. The better the letter, the smaller the
25 jail time the Judge will give me. There's references to

1 that all throughout all of these. And I get no
2 satisfaction saying this, because, Mr. Ardolf, you may
3 be correct in your acceptance letter which I will get to
4 in a few moments, when you state that if the love of
5 your life and your wife was alive at the time this
6 happened with the victims, maybe she would have made
7 this right and made this -- and taken that walk and
8 taken care of it.

9 With all of the things that were said about
10 her and what she meant to you and what she meant to this
11 family and the special woman that she was, and the
12 extraordinary effect on the three young children and you
13 when she died, I think November 6th of 2000 in her late
14 thirties, I think it is very sad that the children have
15 gotten involved, with or without their consent, in how
16 to best address the Court, even if it was intended
17 properly. So, I really have no reluctance in finding
18 the obstruction.

19 I don't really think in the scheme of things
20 it is going to have much effect on what I think is a
21 fair sentence. And maybe both parties disagree with
22 that. But, I will explain what I mean by that when we
23 get to the final decision after additional comments.

24 On acceptance of responsibility, again, I
25 take -- I disregard what happened at the suppression

1 hearing. I won't speculate about that. I believe that
2 the -- I will mention two issues, neither one that was
3 directly brought up today by the parties that played a
4 key role for me, and it is not a close call denying
5 acceptance of responsibility, regardless of what I may
6 think of the two-page letter, and we will get to that
7 before the sentencing is over.

8 First, at the withdrawal of the plea, and I
9 will respectfully reject the notion that it was Mr.
10 O'Brien or anyone else's fault that I was told it was
11 the Kostolniks that had likely framed, and in fact the
12 letter said, I will sue them if the Judge grants the
13 motion. That is a secondary reason for me.

14 The primary reason is the timeliness of when
15 the change, even if it is sincere, which I will have my
16 own view on that, where on the eve of the victim's
17 testimony, and they have been -- you can do much more
18 damage with a computer than you can with a gun or drugs,
19 just like I tell people in fraud cases. You can steel
20 and damage people a lot more with a pen than you can
21 with a gun. That is what happened here.

22 This family has been terrorized, and I will
23 talk more about that at the time of the final sentencing
24 with respect to living in America is freedom from
25 terror, freedom from stress and peace of mind and

1 serenity in one's home. That has all been taken from
2 them with an invasion with a computer, apart from the
3 child pornography. But, I will discuss that, as well.

4 So, on the eve of their testimony, there is a
5 plea that I think they took, according to letters that I
6 received that everyone has, and I think everybody in the
7 courtroom. I thought it was sincerely meant by you, Mr.
8 Ardolf, and perhaps you will say it was in a few
9 moments. On the eve of trial, the only thing worse than
10 a continuance of a trial for victims of a crime that has
11 gone on for such a long time as this is trying to build
12 up to testify.

13 And then on the eve of that testimony, the
14 plea is done. Some type of sense of relief probably
15 came in. And then to turn around and bring a motion to
16 withdraw the plea and talk about the frame possibility.
17 The lack of timeliness by itself, even if I set aside
18 everything else dictates, in the way the motion was
19 brought, that clearly the Court is not going to give
20 credit for acceptance of responsibility. I note the
21 strong objection of the Defense.

22 Area of controversy, enhancement for number
23 of images. I will keep it simple on that issue. I am
24 going to find ten images and deny the objection. But,
25 even if I find nine or eight or five, I will make a

1 statement that will become crystal clear when I impose a
2 sentence.

3 I don't think it is going to affect what I do
4 on 3553(a) factors, because I frankly don't believe that
5 the sentence should be more or less if we are down to 10
6 versus 9. And I think the 3553(a) factors will dictate
7 that the sentence should not be controlled by whether
8 there was two images, because the two images that are
9 most critical, one in particular, was the one that was
10 sent to the employer of the victim in the case. And
11 that really should be the controlling factor, not
12 whether there were two images, eight images or twelve
13 images, even though the child pornography guidelines are
14 clearly driving much of this case.

15 To the extent that if I gave two consecutive
16 sentences on the non-child pornography cases, that would
17 five-year maximums on each, that would be ten. And if I
18 gave discretionary consecutives on two and two, that
19 could give me a starting point of 14 years, even apart
20 from the child pornography guidelines.

21 But, there can be no doubt, and I am sure Mr.
22 O'Brien is going to bring it up, all of the family
23 members have, is well what happened to the two to
24 five-year deal that the Government offered with the same
25 information right before the trial started? I am sure

1 it is going to come up. It has been in every letter I
2 have gotten. And I am sure Mr. Rank will have something
3 to say about that in just a few moments. So, while I am
4 going to give the enhancement for two levels, just so
5 the record is clear, adjusting it, and I will explain at
6 the end when I find the guidelines, in just a moment,
7 how that would affect, because whether I find zero or
8 two images or ten, my sentencing decision today will be
9 the same in my judgment for other reasons.

10 Enhancement for material that portrays
11 sadistic or masochistic conduct. This is not a
12 complicated legal issue, but it is a more difficult one,
13 factually, for me. And it would be even if I hadn't had
14 many child pornography cases. Noting the objection of
15 the Government, I will respectfully grant the objection
16 on this four-level enhancement.

17 It's likely, and I don't disagree with you,
18 Mr. Rank, that there's probably adults standing behind
19 these three children, terrorizing them to get them to
20 engage in oral sex with one another at these tender
21 ages, with or without their knowledge it is being
22 filmed, enforced, but rather than speculate about that
23 and because the real damage in this case is the
24 unredacted photograph that was sent to the employer of
25 Mr. Kostolnik, I will decline to impose the four-level

1 enhancement. Would it make a difference if there was an
2 adult or there were other issues? I don't reach that
3 issue. I've looked at the photographs, and as offensive
4 and damaging as they are, and that is exactly why it was
5 sent to the employer, and we will talk about that in
6 just a few moments. I decline to give an additional
7 four-level enhancement for sadistic or masochistic
8 conduct without knowing more.

9 And I would suggest something that perhaps
10 neither party will agree with. I am not so sure my
11 finding that enhancement or not finding it, while it
12 directly affects the advisory guidelines, I'm not sure
13 how it affects what the right sentence is today under
14 the 3553(a) factors.

15 Enhancement for use of special skill.
16 Without any reluctance, I respectfully deny the
17 objection of the defense. Many, many hours in education
18 were spent, it is clear, the record is clear even before
19 Agent Cameron testified. The knowledge and special
20 skill apart from all of the time that was spent, for
21 whatever reasons that may be relevant to what is a fair
22 sentence, it is not relevant to this enhancement, is
23 skill and talent beyond the ordinary knowledge of most
24 individuals. And that is clear in the record, both with
25 the content of what was found in the home, clear as to

1 how it was used both books, CDs self-taught materials.
2 And the fact that we all can get access to it on the
3 internet, I think, is of little significance.

4 Somebody has to choose to dedicate their life
5 to getting a certificate of certified ethical hacker,
6 and choose to get a level of knowledge that I think few
7 people possess. And even though it is correct, Mr.
8 O'Brien, how that knowledge was used, should we punish,
9 additionally, people who happen to have expertise? I
10 don't disagree with that. But, the enhancement clearly
11 should be applied in this case.

12 The aggravated identity theft, I will make
13 another statement that both parties may disagree with.
14 While I agree with the respective opinion, Mr. O'Brien,
15 but I agree with the Government's position, but I will
16 also state that whether I feel I am going to give a
17 mandatory consecutive two years which I will so find at
18 this time, after all the Defendant pled guilty to both
19 counts that were charged under this Section 1028A -- I
20 apologize for using the number -- and the presentence
21 report concluded consistent with the law that a
22 violation of this carries with it a mandatory two years,
23 whatever the rest of the sentence is. The only
24 exception being if the Court chooses to run it
25 concurrently with one another -- the two separate

1 counts.

2 I think the statute clearly reaches this,
3 consistent with the argument and the record in the case
4 and the argument in the briefs. I will state that even
5 if the Court would have concluded or a higher court
6 concludes that it shouldn't have been consecutive, I
7 will explain once we get to sentencing why I believe I
8 would have ended up at the same place with a sentence
9 because there was also another rule of law that states
10 when all of the concurrent and consecutive issues are
11 evaluated, if the Court concludes that the 3553(a)
12 factors are not properly served in fairness to either
13 the Government or the Defense, that the Court should
14 then consider the concurrent versus consecutive.

15 Noting the strong objection of the Defense, I
16 will impose that. And I believe that constitutes all of
17 the -- so, where that leaves us is this. This creates a
18 level 34, rather than 38. And based upon no criminal
19 history points, that creates an advisory imprisonment
20 range of 151 to 188 months, not counting in the
21 consecutive two-year sentence, as opposed to a level 38,
22 which is 235 to 293 months, without taking into account
23 the two-year mandatory minimum sentence. So, that is
24 151 to 188, as the advisory sentence. Supervised
25 release term of five years up to life, a fine range of

1 17,500 to 250,000, special assessment of \$600. And just
2 for the record, for some perspective, if I had granted a
3 two-level reduction, either for lack of obstruction, or
4 on the lack of the ten photos, because that is a
5 two-level enhancement, that would have dropped the
6 advisory range to 121 to 151 months. If I had granted a
7 one-level enhancement rather than two, because we're
8 right on the precipice of ten pictures, that would
9 create an advisory range of 135 to 168 months, again
10 without taking into account the mandatory two-year
11 sentence. So, the advisory range we start with here,
12 Counsel, is 151 to 188. And to the extent that does not
13 represent what either party has asserted to the Court, I
14 note your objections. Your objections are preserved.
15 So, when we head into argument, now, and then we are
16 going to talk about a short break before we conclude,
17 before we head into argument, then where we start with
18 is an advisory sentence of 151 to 188 which carries with
19 it a 5-year mandatory minimum, and then a two-year, as I
20 have found, mandatory consecutive. So the floor, so to
21 speak, turns out to be the seven years, and the maximum
22 is 44 years. So, that is the span with the Guideline
23 range being 151 to 188. And under federal law, unlike
24 state law, you earn -- you serve 85 percent of the time.
25 You get 15 percent off each year, regardless of what the

1 Court does, of course. And whatever time Mr. Ardolf has
2 been in custody is removed, whatever the sentence would
3 be. I would suggest that we take -- well, let me have
4 counsel consult with their clients.

5 Let me ask Counsel and put you on the spot,
6 you know, because the difficulty with the Judge asking
7 is people feel pressured into making their final
8 arguments. But, what does the Government foresee with
9 the time you would like to have to make your closing
10 argument, so to speak, and get a victim to testify or
11 come to the podium.

12 MR. RANK: Your Honor, a couple to different
13 issues. One is, I want to make sure the Court considers
14 the time for the victim impact statements to be read. I
15 anticipate that there will be two statements by the
16 victims in this case? In addition to probably about --
17 I don't know exactly how long that is going to take. It
18 could take 10, 15 minutes. My argument will be 10 to
19 15 minutes, Your Honor.

20 THE COURT: Mr. O'Brien?

21 MR. O'BRIEN: Well, I know that Mr. Ardolf
22 wants to address the Court, Your Honor.

23 THE COURT: I assume that. And what I am
24 thinking, and this may be to the chagrin of some of you,
25 and of course if I am thinking only of myself, I

1 wouldn't take a break. I am fortunately much less known
2 for that than I was years ago. But, I think we should
3 take a half-hour here, unless I completely prejudice
4 somebody's schedule to give people a chance to get a
5 bite to eat. I am not a good judge of that, because I
6 usually don't eat lunch. So I can't attribute that to
7 other people. But, it seems to me that will take some
8 pressure off. 15 minutes isn't enough for people to get
9 a snack or something and so they feel like, well, the
10 Judge wore us down in the courtroom. And then we can
11 convene at 2:00 and finish up, if one of you thinks I
12 have either overreacted to the time and we should either
13 take less time or more time, I am all ears.

14 Mr. O'Brien, since you are standing there?

15 MR. O'BRIEN: Your Honor, I am fine with
16 that.

17 THE COURT: Mr. Rank?

18 MR. RANK: Your Honor, I am fine with taking
19 a shorter break, if that is what the Court is inclined
20 to do. I know that primary issue is --

21 THE COURT: Well, maybe others, depending on
22 medical needs, snacks -- sometimes people say, well, the
23 Judge just charged through, the lawyers do. If we had a
24 jury here we wouldn't think of running that long without
25 some type of -- but, let's take until 2:00, and then we

1 will go until we are done. And I think that is what we
2 should do. So, we will stand in recess until 2:00.

3 (Luncheon recess.)

4 THE COURT: You may be seated. Thank you.
5 Mr. Rank -- excuse me. I will propose to both you and
6 Mr. Ardolf and Mr. O'Brien, I was going to suggest if
7 there was going to be victim impact statements read or
8 the victims have a statement to make that we could do
9 that at this time. And then once that is completed, I
10 will hear from Mr. Ardolf and Mr. O'Brien. And then I
11 will hear from you with respect to -- unless there are
12 other requests for testimony -- with respect to final
13 arguments, or arguments in light of the applicable
14 guidelines as found by the Court with objections noted,
15 even though I am quite certain I understand the
16 positions of each party. We would proceed in that
17 order. Is that acceptable to the Government?

18 MR. RANK: Yes, Your Honor.

19 MR. O'BRIEN: Certainly, Your Honor.

20 THE COURT: So, what we will do is without
21 knowing for sure how you are going to proceed, do you
22 know if either victim would like to make a statement to
23 the Court?

24 MR. RANK: I do, Your Honor, I believe both
25 Matthew Kostolnik and Bethany Kostolnik --

1 THE COURT: Whether they come up together or
2 alone is up to you. And maybe they could just stand at
3 the podium with you?

4 MR. RANK: Give me moment, Your Honor.

5 THE COURT: All right.

6 MR. RANK: Your Honor, both Matthew and bet
7 Bethany Kostolnik would like to address the Court and
8 would like to be up here together during their
9 presentation.

10 THE COURT: That is fine. And whoever
11 proceeds first, if you would just state your name first
12 and then you can go ahead and say what you want to say.

13 MR. KOSTOLNIK: Thank you, Your Honor. Good
14 afternoon. My name is Matt Kostolnik. Your Honor, I
15 will intend to briefly introduce some of the facts and
16 go through how all this --

17 THE COURT: I am sorry to interrupt. I will
18 just indicate to you that obviously I acknowledge that
19 you have made what is commonly called -- some people
20 would say statements. We commonly call them victim
21 impact statements. That I assume all of the parties
22 have read, and as to how and what you want to say today,
23 that is entirely up to you. So --

24 MR. KOSTOLNIK: Thank you. We were excited
25 to move into a new neighborhood and our new home, both

1 of which we thought were everything we wanted. The
2 incident between Ardolf and my son occurred the second
3 day we were in the home.

4 Ardolf's interaction with my son occurred
5 over a period of minutes during which time it became
6 increasingly apparent to my wife that something was not
7 right about how Ardolf interacted with my son and with
8 her.

9 This was the very first time the two of them
10 had met. He had just moved into his house a few weeks
11 before us. My wife was literally unpacking and moving
12 into our home and was visibly pregnant with our third
13 child. If there was ever a time where it would have
14 been easy to make ordinary small-talk, that was it.
15 Instead, the only question Ardolf asked her was, do you
16 have any more children? He seemed interested only in
17 playing tag with my son. But, instead of saying, I bet
18 you can't catch me, he said bet you can't touch me.

19 At one point he held the back of my son's
20 head close to the ground in the direction of a plant he
21 wanted to show him. My wife felt something was not
22 right. And she attempted to move our son away from
23 Ardolf. She picked up our other child. Ardolf picked
24 up our older son, brought him to our door, and before
25 letting go of him, he kissed him while my wife's back

1 was turned.

2 I was inside when this first incident with
3 Ardolf happened. I have known my wife since she was 17,
4 and I trust her and I trust her mother's intuition. And
5 when it comes to keeping our kids safe, I want to
6 emphasize that in all of the years I have known her, she
7 has never described anyone to me, ever, as to how she
8 described Ardolf after this initial incident. I was
9 convinced we had a problem, but we did not act rashly.
10 Instead, we gave ourselves some time to clear our heads.
11 And the next morning we still felt sick about what
12 happened. We decided to drive to a park and go for a
13 walk. Without having been asked, my son brought up the
14 incident and volunteered to my wife that Ardolf had
15 kissed him on the mouth.

16 Bethany and I talked about what to do. I
17 spoke to my father. We took a good portion of the
18 afternoon thinking about what to do. Later when Ardolf
19 was out in his yard, I asked him directly out in the
20 open, tell me what happened between him and my son. I
21 attempted to engage him in a dialogue to hear his side
22 of the story.

23 I asked broad, open-ended questions and was
24 not accusatory. It was like pulling teeth. He kept
25 providing other details. Finally asking a variation of

1 the same question, what seemed like the 18th time, he
2 admitted he kissed my son. When I asked him where, he
3 wouldn't even tell me with words. Instead, he silently
4 put his finger to his lips. And I asked him, you kissed
5 him on the lips? And he nodded his head.

6 For me, that was the only confirmation I
7 needed. Recognizing that no one would have been able to
8 vouch for Ardolf because he was entirely new to the
9 neighborhood, too. We didn't know who or what we were
10 contending with, or what past he left behind in his old
11 neighborhood. Under these circumstances, even if what
12 he did was not a crime, we thought the authorities
13 needed to know about it. Since I had never called the
14 police on anyone, ever, I did not arrive at that
15 decision lightly. And I have to say, looking back on
16 that decision, our initial impression of this guy that
17 he was a threat was entirely correct.

18 Your Honor is already familiar with the
19 evidence related to the charges, but I would like to
20 tell you about what it is like to have lived through
21 this. I cannot describe the sick feeling in the pit of
22 my stomach when my assistant showed me a printout of the
23 e-mail she received that she thought was from me. And
24 then the Chairman of the Board of Directors at my firm
25 followed up a short time later with an e-mail he

1 received that he thought was from me that contained
2 picture attachments of child pornography. That e-mail
3 had a picture attachment named, "Matt'sKids." It
4 contained graphic images of three children, two boys and
5 a girl --

6 THE COURT: And that picture was up here on
7 the screen. The one that you received didn't have -- or
8 that your firm received didn't have the redaction on the
9 face, either.

10 MR. KOSTOLNIK: That is correct, Your Honor.
11 The e-mail to Dave Senger, the Chairman of the Board of
12 Directors of my firm was the unredacted image of the
13 three children. When he talked to me about it, he did
14 not have the image with him, but I later viewed it on
15 the computer of Bruce Garber, our IT professional when I
16 asked him to pull it up, and I viewed it on the screen.
17 And that was the e-mail that Dave Senger received that
18 he had talked to me about earlier that morning.

19 That e-mail, that picture attachment named
20 "Matt'sKids" contained graphic images of three children,
21 two boys and a girl. I had three children, two boys and
22 a girl. I felt like me and my family were under attack.
23 Part of me went numb that day, a feeling that worsened
24 later that night when I talked to Bethany about what was
25 happening. And we didn't know what was going on, what

1 we should do, or who we could trust.

2 After the initial incident in August with
3 Ardolf and our son, we intended to keep our distance
4 from Ardolf and be very mindful of his presence while we
5 contemplated moving from our new house. But, after
6 these threats began in February, our already heightened
7 awareness increased tenfold. We no longer felt safe in
8 our own home.

9 We soon learned from law enforcement that the
10 threats were coming from our house. We considered our
11 potential vulnerabilities within our home and attempted
12 to address physical and electronic root points.

13 Yet at the same time, because the link
14 between the threats and Ardolf had yet to be established
15 to the degree of certainty required for law enforcement
16 to execute a search warrant, we needed to continue to
17 use the same hacked wireless router in the hopes that
18 Ardolf would continue to make connections that could be
19 tracked. This was like supplying rope so that Ardolf
20 could use it to hang us.

21 The effect of terrorism on its victims is
22 really twofold. First, of course, there is the horrific
23 act, itself. But there is also the secondary effect on
24 the minds of the victims who live in constant fear of
25 another attack. Until Ardolf was incarcerated, not a

1 day went by where I wasn't thinking that another attack
2 would occur.

3 First, Ardolf used my co-workers as the means
4 to deliver the attack, using a fake e-mail address by
5 name. Then a few weeks later, he e-mailed other
6 co-workers accusing me of sexual assault.

7 The next month I got a call at my desk from
8 the Secret Service asking me whether I had been sending
9 threats to elected officials. And the next thing I
10 knew, I was meeting with the Secret Service at my office
11 explaining that, no, I really didn't make bad threats to
12 elected officials. I also want to say during this
13 meeting it became apparent when the Secret Service began
14 asking me questions that they were not familiar with the
15 investigation that had already been begun by the Anoka
16 County Sheriff's Department. I don't know why I would
17 have expected them to be, but this revelation was
18 frightening to me. Because now, to add to the list of
19 threats I had already experienced and was fully
20 expecting to continue, I was in fear that a branch of
21 law enforcement not familiar with the case would
22 follow-up on an incident, unknown to me, and not show
23 the same restraint that the Secret Service did in
24 calling a meeting with me, I would think that one of
25 these incidents would somehow lead to my arrest.

1 The back of Ardolf's lot and house is
2 immediately adjacent to our front and side yard. There
3 were a picture window in our house. Ardolf could see
4 into our house. And we can see out into the windows of
5 the rear of his house. He was on his computer
6 constantly.

7 So, if I needed a reminder, and I didn't, I
8 was always waiting, wondering when the next bomb would
9 drop. And since the incidents were alike, yet
10 dissimilar, there was no way of predicting where the
11 next threat would come from.

12 They say that paranoia is making connections
13 between actual events where none really exist. This is
14 what it is like to be a victim of a crime like this.
15 E-mails are automatically viewed as suspect. Computers
16 are a gateway of being hacked. Telephone calls from
17 unrecognizable numbers are no longer innocuous, but
18 potential threats.

19 At its worst, certain strangers may be
20 perceived to be affiliated with unknown threats. And
21 when events continued to snowball, as they did here, and
22 every few days you are talking with someone involved in
23 the investigation, and every few weeks a new incident
24 does in fact occur, you don't even try to suppress your
25 fear anymore, because someone really is out to get you

1 and they are succeeding.

2 At that point it is hard to call it paranoia.
3 At that point fear and anxiety become a way of life.
4 So, what is it like to live as a victim of these crimes?
5 It means that because threats come in via my workplace
6 e-mail, I experience anxiety at work, especially because
7 Ardolf chose to direct his e-mails to the very same
8 people responsible for deciding whether or not I get to
9 keep my job.

10 It means at home, I lived next door to the
11 person who is and wants to continue to inflict harm on
12 me and my family. Sleeping through the night didn't
13 happen because a thump in the night is not presumed to
14 be harmless. I would wake up at the slightest sound
15 that was out of the ordinary and would get out of bed to
16 investigate.

17 In short, there is no sanctuary, physical or
18 otherwise. And because these threats invade your mind,
19 you are constantly forced to reckon with them. On July
20 6th, 134 days after the beginning of Ardolf's terror
21 campaign, I received an anonymous e-mail that said: I
22 know where you and your family live and I am going to
23 get you back for suing us.

24 A week later Bethany opened an e-mail to her
25 that specifically referenced our three kids, and said:

1 I know your husband Matt and I am going to get him.
2 Bethany is a stay at home mom. It says something about
3 her courage and her upbringing to have raised our
4 children living next door to Ardolf for 707 days until
5 he was incarcerated.

6 She needed to put a brave face on this for
7 our children to simultaneously care for them and keep
8 them safe from harm. Even with Ardolf incarcerated, she
9 continues to suffer nightmares of him that began during
10 this ordeal. Yet today, she pities Ardolf and feels
11 compassion for his son and two daughters.

12 At the change of plea hearing, I wanted to
13 believe that Ardolf was remorseful for what he had done.
14 For a moment I believed, mistakenly, that Ardolf had
15 turned a corner. But after he tried to withdraw his
16 plea of guilty, I now however know the tears he cried
17 were for himself.

18 If you asked Ardolf today, he will tell you
19 he is sorry. He will acknowledge his guilt. And he
20 will say, if he could take it all back, he would. But,
21 when you hear those words, remember what he has to gain
22 or lose here today and that this is not the first time
23 during these proceedings that Ardolf has tried to
24 manipulate the result.

25 A much better gauge of Ardolf is the words he

1 used when he didn't think he would be caught. Words
2 like terrorist threat, hate. I'm assigning myself to be
3 judge, jury and executioner. Pay the ultimate price.
4 Put to death. I swear to God I am going to kill you. I
5 am going to get you back. I am going to get him. He is
6 going to pay.

7 When Ardolf hacked his former neighbors in
8 his old neighborhood, he made similar violent threats of
9 death saying: You should be very afraid. I can destroy
10 you. You sorry, expletive, excuse for a human.

11 Given a chance, he would do it all again,
12 either against me and my family or someone else. What
13 is the number one job of any husband and father? It's
14 to protect and provide for your family. Knowing that I
15 lived next door to a person that wanted to have me dead
16 and wanted to harm my family, I responded.

17 I have gained greater situational awareness,
18 physical fitness, getting a new perspective on our
19 vulnerability to those who would do us harm.

20 I was lucky. At the outset I had an employer
21 who supported the investigation and the retention of an
22 outside investigator, Scott Johnson, who was
23 instrumental in capturing evidence of Ardolf's crimes.
24 That is a unique situation.

25 The next person targeted by Ardolf is

1 unlikely to have the same resources that we did. The
2 only real way to protect others from him is to keep him
3 in custody for as long as is permitted under the law. I
4 know it is right to forgive, and if I live a long life,
5 maybe before I die, I will. But, right now, justice
6 needs to be done, here today, in this courtroom.

7 The length of Ardolf's sentence is entirely
8 related to the length of time my family can live without
9 fear of his retribution. In 10 years my daughter will
10 still be in adolescence. 15 years, in her middle teens.
11 She is vulnerable. We are vulnerable. And we will
12 remain vulnerable to him throughout our lives except
13 while he is incarcerated.

14 The statutory maximum sentence Ardolf faces
15 based on the crimes he committed is 44 years. This is a
16 44-year case. And Ardolf is a 44-year criminal. Ardolf
17 has lived a life of retribution not just against me and
18 my family, but others. When he gets out, me and my
19 family are back to where we were before he was
20 incarcerated. We are either victims or potential
21 victims.

22 Having been through a period of victimization
23 once already, I can tell you that there is no more awful
24 feeling. The only thing a victim wants is to never be
25 victimized again. Please help me. Please help my wife.

1 And please help my children by imposing a substantial
2 sentence.

3 Last, I want to thank the efforts of law
4 enforcement and specifically Special Agent Bob Cameron.
5 To paraphrase Winston Churchill, we sleep soundly in our
6 beds because these brave men and women stand ready to
7 confront those who would do us harm.

8 I want to publicly acknowledge Tim Rank.
9 First, Mr. Rank is the most highly-skilled lawyer I have
10 ever known. His prosecution of this case has been
11 superlative at every step. Second, Mr. Rank is a true
12 professional.

13 His interaction with me and my wife should be
14 held out as a model of how to do things the right way.

15 I can look back on the events of the last few
16 years and see many hugely positive developments during
17 the lifecycle of this case. But, without a doubt, what
18 I am most grateful for is the effort of Tim Rank, who
19 has shown relentless dedication of the law and the
20 pursuit of justice, and of someone who possesses the
21 highest degree of skill and acumen to accomplish those
22 worthy goals.

23 Your Honor, thank you for this opportunity to
24 speak to you today.

25 THE COURT: Thank you.

1 MRS. KOSTOLNIK: Your Honor, my name is
2 Bethany Kostolnik. August 2nd, 2008 changed our lives
3 in an unimaginable way. My family moved into our home
4 in Blaine specifically because of the neighborhood, a
5 quiet cul-de-sac with kids all around.

6 The incident between Barry and my
7 four-year-old son was heart-wrenching, frightening, and
8 sickening. The fear that I felt that day has snowballed
9 into nearly three years of stress, pain and suffering at
10 the hands of Barry.

11 I cannot begin to explain the helplessness my
12 husband and I felt as this nightmare began to unfold.
13 We didn't know who to trust. From one of the first
14 e-mails that was sent, the one of young children shown
15 in sexual poses that was labeled "Matt'sKids." We knew
16 it was Barry.

17 Later that week we learned that the e-mail
18 had come from our house. Matt was gone that weekend and
19 I was terrified that someone would think that I actually
20 sent the e-mail, that it had come from me. I was
21 fearful of someone taking my kids away from me, as a
22 mom. With nothing but good intentions for our children,
23 this was petrifying.

24 Barry then proceeded to further attempt to
25 ruin Matt's career, my career, our marriage, and he

1 ultimately destroyed any sense of safety we felt in our
2 own home. I am a stay-at-home mom. Until he was in
3 jail for violating the terms of his release, I lived
4 each and every day in fear. I had horrible nightmares.
5 Repeated nightmares of seeing his face in the windows of
6 my home, nightmares of him attacking my children, and
7 nightmares of him attacking me.

8 My husband and I had to explain to our young
9 innocent children way too early that there are evil
10 people in the world and never go into Barry's yard. All
11 I wanted to do is keep my kids safe. It is a horrifying
12 feeling to question whether or not you can do that. His
13 attacks were physical, but the wounds run deeper. My
14 anger towards Barry has changed to pity.

15 Pity for a man who instead of being a role
16 model and devoting himself to his children who lost
17 their mom at a young age chose to cowardly hide behind
18 computers in his home and terrorize us and attempt to
19 ruin our life.

20 I have a great amount of empathy towards his
21 children. Our family can't -- although this is true --
22 our family can't get past this experience with the
23 constant reminder that Barry's family is next door to
24 us. It is very important to us that no one in the
25 Ardolf family lives next door.

1 I am a compassionate, forgiving and Christian
2 person, but I don't believe Barry will be reformed in
3 prison. He is selfish, impulsive and manipulative. He
4 has tried to manipulate the situation from the
5 beginning. The only thing Barry is sorry for is that he
6 got caught.

7 And the fact that he hinted at his change of
8 plea hearing that Matt and I framed him is impulsive and
9 despicable. I am terrified for the day he gets out of
10 prison. I am a stay at home mom. I have a two-year-old
11 girl and two young boys. I fear for them.

12 Although his violence towards us was never
13 physical, I don't doubt that it could be. The burden of
14 this situation is indescribable and continues to put a
15 great deal of stress on our family. It has been
16 life-changing. Please, Your Honor, I am asking you to
17 give him a heavy sentence, the maximum possible. We
18 need to start anew and we can't do that if he is out of
19 prison in a short amount of time. My family has
20 suffered enough at his hands. We need this nightmare
21 to be over. Thank you.

22 THE COURT: Thank you.

23 Mr. O'Brien? And then whether you want to
24 address the Court first with the permission of Mr.
25 Ardolf, or Mr. Ardolf can address the Court if he

1 wishes. I will leave that up to you and to him.

2 MR. O'BRIEN: The Court has no preference,
3 Your Honor?

4 THE COURT: No, I think that is up to Mr.
5 Ardolf in consultation with you.

6 (Discussion off the record between the
7 Defendant and Mr. O'Brien.)

8 MR. O'BRIEN: Mr. Ardolf would like to
9 address the Court.

10 THE COURT: All right. And I don't mean to
11 insult your intelligence, Mr. Ardolf, but one of the
12 things that I think you are probably aware of, judges
13 appropriately can't assume, and I don't have the right
14 to assume that regardless of who is in front of me.

15 You have the right to make any presentation
16 you wish. You have the right to say nothing at all, in
17 addition to what Mr. O'Brien has said, and the
18 submissions you have made and others. And I can't use
19 it against a defendant at sentencing, whether they are
20 representing themselves or not, if they choose not to
21 address the Court. Some defendants do, some don't, so
22 there is no rule. So, it is up to you, sir.

23 THE DEFENDANT: It's terribly difficult to
24 listen to what I did. I can't believe that I did it.
25 And yes, I do want to apologize to the Kostolniks, their

1 family friends, co-workers, and I have to apologize to
2 my family and friends and to my co-workers. And I
3 apologize to others that I might have affected.

4 After listening to the Kostolniks and their
5 statements, it is so difficult to proceed with what I
6 have written. For many months I have woken up with the
7 same twisted gut as when I woke up the first day after
8 my wife unexpectedly died.

9 My victim and everyone involved is the first
10 thing I think of when I wake and the last thing I think
11 of when I sleep. I am so upset about what I have done
12 that the jail staff have even told me that they can see
13 that I am bluntly upset. It has been difficult for me
14 to eat. I have felt no enjoyment. The general doctors
15 put me on mood stabilizers in an attempt to prevent me
16 from feeling too low.

17 After listening to the Kostolniks, I feel
18 very low. During the last 12 months in jail, about half
19 that time has been spent in either medium or maximum
20 segregation, which includes 23-hour lockdown. This
21 isn't because I was a troublemaker, but rather for my
22 safety due to the nature of my case.

23 I have used this time to ask my God for
24 forgiveness. I ask for forgiveness every day. There
25 are some words in the Bible which most people have

1 heard: For the least you do unto me, you do unto
2 yourself.

3 I am now one of the few who really feel and
4 understand that meaning.

5 Jail is a horrible place to spend time.
6 There is no such thing as seeing the outside. There is
7 no fresh air. There is nothing to do. I have spent
8 many months in cells with no hot water. The food is
9 horrible. Some meals I can't even stomach. It is never
10 quiet. Doors are always slamming, people coming and
11 going. People usually yelling. Segregation is where
12 the worst people are kept. I have seen things I can't
13 talk about in open court.

14 The beds are like taking a sleeping bag and
15 sleeping out in the garage cement floor. This is
16 because beds literally are either cement or steel, and
17 the mattress is only a couple of inches thick. Because
18 I am not educated in the law, Mr. O'Brien has dealt with
19 the legal aspects of my case.

20 Today I can defend myself by quoting some
21 cases that I have -- that have been in the Star Tribune,
22 lately. The comparison is to put in perspective my case
23 with others. And I also want to say before I will read
24 these, after listening to the impact statements, these
25 seem -- I will just continue.

1 We all know that Denny Hecker was sentenced
2 to 10 years for stealing millions. On June 29th, the
3 con artist Michael Joseph, he faces 9 to 11 years for
4 stealing \$20 million. He has a previous conviction.
5 May 5, Shelbi Lynn Svare, gave a man a pain patch, which
6 he ate, causing his death. She was sentenced to 4 years
7 for killing a man.

8 Mr. Daniel Rike (PH) killed his 18-month-old
9 girl. The Ramsey County District Judge sentenced him to
10 16 months in jail.

11 A DWI driver, Kristin Kealy of Fridley was
12 sentenced to one year for a crash which paralyzed
13 another person for life from the neck down.

14 Jeremy Parker hacked into Eden Prairie-based
15 Digital River and stole about \$275,000, and he hacked
16 into two NASA computers. NASA spent about \$67,000 to
17 repair the damage. He was sentenced to two years.

18 And I can see that this case isn't just about
19 the hacking, it is about the terrorist. And it is
20 really hard for me, too, to live with what I just heard.
21 And I will be living with that. I can't look the
22 Kostolniks in the face. I can't -- I can't face my
23 family.

24 But with respect to the news articles, I
25 didn't kill anyone. I didn't collect and distribute

1 thousands of porn pictures and movies. If I was
2 prosecuted in State Court, possession of porn is
3 generally a 15-month state sentence with probation.

4 Your Honor, this state used to have a red
5 light camera. Red light cameras which took a picture of
6 a car running a red light. These red light cameras met
7 opposition partially because an officer could no longer
8 apply common sense and human judgment to a situation. I
9 am asking for some human judgment.

10 The law is the place to go after people who
11 really have a problem with porn. Human judgment should
12 fall into the area of leniency.

13 My wife dying before the age of 38 has made
14 me acutely aware of how precious time is. My children
15 and I are asking for a minimum sentence. The impact
16 this has had on me has been worse as I've become a
17 little bit older. Again, I would like to ask to
18 apologize to my family and I would like to apologize
19 again to the Kostolniks.

20 THE COURT: Thank you. With Mr. Ardolf's
21 permission, I assume, Mr. O'Brien, I assume any
22 arguments you have, I will hear you?

23 MR. O'BRIEN: Thank you, Your Honor.

24 THE COURT: And again, I would acknowledge
25 you submitted an extensive, as did Mr. Rank, and his

1 co-counsel, position pleadings that not only addressed
2 what we dealt with earlier, but the issue that is now in
3 front of me on -- well, regardless of what the
4 Guidelines say, what is the proper sentence this
5 afternoon.

6 MR. O'BRIEN: If I may, Your Honor?

7 I find this to be an incredibly troubling
8 case. It is gut-wrenching listening to the Kostolniks
9 talk about the psychic harm that they have been
10 inflicted. It is terrible to speak to Mr. Ardolf's son
11 and his father as they try to make some sense of this.
12 And the way this case has evolved is also troubling, the
13 failure to accept responsibility, the motion to
14 withdraw, it is very painful to see that a situation
15 that should have been handled differently has been
16 handled in a way that now we are facing a very, very
17 long prison sentence.

18 And of course, the question now is, Your
19 Honor, what is a reasonable sentence for such
20 unreasonable acts? When this case started for me,
21 anyway, I found Mr. Ardolf to be too arrogant, not
22 willing to listen. I think his feelings, his thoughts
23 had evolved, although I have been raised to think the
24 better of people. And I think that Mr. Ardolf has had
25 some insight and some realization. And it has taken a

1 while.

2 And I am reminded that someone said this,
3 that there are three types of secrets: Those which we
4 only tell our friends; those which we only tell
5 ourselves; and those which we don't even tell ourselves.
6 And I think Mr. Ardolf was in that third category for a
7 while. I don't think he could come to grips with what
8 he had done.

9 And I think it was so difficult for him to
10 come out and say, yes, I have done this, because of the
11 tremendous harm that he has done to this young couple
12 and their family.

13 But also, he hurt so many people, Medtronic
14 is a victim of this. Their work stations were used.
15 Mr. Ardolf's father and siblings, and his children --
16 and these are scandalous facts. This is going to be in
17 the headlines. There is a tremendous amount of stigma
18 that that family has to put up with. There is a lot to
19 swallow.

20 THE COURT: That is true.

21 MR. O'BRIEN: And now we are facing a huge
22 sentence which is really driven by the application of
23 the child pornography Guidelines.

24 Now, Mr. Ardolf has no one to blame but
25 himself. He sent those child pornographic images. But

1 on the other hand, as opposed to a typical child
2 pornography case, he wasn't motivated by a desire for
3 sexual gratification. He had another very noxious
4 motivation, but it wasn't the typical one for a child
5 porn case. And these Guidelines are tremendously high.

6 As we look at Mr. Ardolf, as we should under
7 the *United States versus Koon*, we look at him as an
8 individual studying in the unique failings which have
9 brought him before this Court.

10 He has done some bizarre, hurtful acts and he
11 is going to be punished for them and. He is a person
12 with qualities, but also flaws. There has been some
13 misplaced arrogance, and I think that has led him to
14 make some decisions through his case which are very
15 troubling.

16 The Court mentioned that I was going to bring
17 up the fact that there was a deal before trial where he
18 could have walked away with a much shorter sentence than
19 he is going to receive. And --

20 THE COURT: Well, actually, probably -- I
21 don't know if I mentioned to you, I know that was a
22 question that many of the family members raised, even
23 though they said two years was offered, and I think the
24 potential was more, was closer to a five-year sentence,
25 but it was in there somewhere. Maybe it was the

1 mandatory two, and it was up for grabs for what I did on
2 Count 1, but that question was raised.

3 MR. O'BRIEN: It is an issue, but I am not
4 here to say that that deal should hold. I know that
5 there has been a lot that has happened since then. I
6 know that the victims in this case have been denied
7 closure. I know the Government has spent a lot of
8 resources. And I know the decision not to take that
9 deal was made by Mr. Ardolf. And I know he has to pay
10 for that.

11 My question is, how much does he have to pay
12 for that? It is the same conduct. And I think there
13 should be some measure, some standard to go by in
14 fashioning a reasonable sentence for him.

15 In other words, what is a sentence which is
16 sufficient, but not greater than necessary to promote
17 deterrence? Now, the Kostolniks have talked about how
18 their worst nightmare is that Mr. Ardolf comes back when
19 he is released and starts this again. I have much more
20 faith in the United States Probation Office to think
21 that that would ever happen. So, I don't think
22 deterrence for Mr. Ardolf is necessarily the bigger
23 concern. I know the Court -- when I have been before
24 this Court on prior occasions, I have learned that the
25 Court is interested not only in deterrence for that

1 individual defendant who the Court is sentencing, but
2 also deterrence, in general.

3 What does this case say about our society?
4 How are we going to deal with somebody who acts as
5 unreasonably and as viciously as Mr. Ardolf? Well,
6 there has to be a firm sentence, but a measured
7 sentence, Your Honor, one that not only promotes respect
8 for the law and provides just punishment, but one that
9 is sufficient, but not greater than necessary to
10 accomplish those goals.

11 I have suggested a sentence in the range of
12 63 to 78 months. I suspect the Court is going to
13 sentence Mr. Ardolf to a greater sentence than that.
14 But, I would ask for a measured sentence from the Court.

15 THE COURT: Thank you. Mr. Rank?

16 MR. RANK: Thank you, Your Honor. Your
17 Honor, this is one of the most difficult sentencing
18 arguments that I have ever had to make. And I think I
19 have come to that point because I worry that I am not
20 going to say enough to the Court.

21 I know the Court has to take a lot of things
22 into consideration other than my words here today, but I
23 do worry that I am not going to say enough.

24 Judge, there are lawyers who have routinely
25 argued, make arguments to courts, to Your Honor,

1 starting off with, "in all of my years as a lawyer,"
2 that sort of phrase, to make their arguments. And I
3 have to say I have never, never done that before, never
4 stood in front of a court and said in all of my years as
5 a prosecutor, I have not seen this, or I have seen that.
6 And that is because I never really thought it was
7 appropriate until today's hearing.

8 I have been a prosecutor for a long time in
9 State Court, now in Federal Court, prosecuted a wide
10 variety of people for physical violence, abuse,
11 financial crimes. I was primarily a homicide prosecutor
12 when I was in the state.

13 And, Your Honor, in all of that time, I have
14 only come across a couple of Defendants, a handful of
15 Defendants who concern me as much as Barry Ardolf
16 concerns me. His actions that he has taken in
17 connection with this case have shown that he is capable
18 of acting with absolutely ruthless cruelty over a long
19 period of time in a calculated fashion.

20 In this case, living right next door to a
21 family and trying, quite literally, to destroy them.
22 And he has shown, Your Honor, through -- I will address
23 the Court's question that you raised and Mr. O'Brien
24 briefly talked about, and maybe you have seen in
25 letters, which is why should the sentence be different

1 than it was back when there was a plea offer on the
2 table back in April of 2010? And there is a very easy
3 answer to that question, Your Honor. Because as the
4 Court is aware, prior to any charging in this case after
5 the search warrant that was executed in this case, I was
6 contacted by Mr. Ardolf's first lawyer, the first of his
7 three lawyers who reached out and said, before any
8 charging takes place, can we come and meet with you?
9 Eric Olson represented Mr. Ardolf at the time and is a
10 good lawyer. And I didn't frankly know enough about the
11 case at that time other than a case on paper.

12 I said, fine. We put the case together,
13 Special Agent Cameron and myself sat down with Mr. Olson
14 and Mr. Ardolf, and we showed them a summary of the
15 exhibits and evidence against him. And that was in
16 around April of 2010. And we said, if we can resolve
17 this, pre-charging, here is what we would be willing to
18 do.

19 And I made what I thought was a rational
20 offer in consultation with the victims to bring closure
21 to the victims immediately and I got what I thought was
22 a rational, reasonable response, which was Eric called
23 and said: Let's put it on for a plea hearing. We have
24 a plea agreement.

25 And that seemed to be a rational response for

1 what had happened if this was a mistake, if this was a
2 lapse in judgment, if this was not about who the
3 Defendant was.

4 And then as the Court knows, we had this on
5 for a sentencing hearing, and right before the
6 sentencing hearing, the weekend before I got a call from
7 Mr. Olson saying I have been fired.

8 THE COURT: For a plea hearing.

9 MR. RANK: I'm sorry, for a plea hearing. I
10 apologize, Your Honor, that is correct.

11 THE COURT: Right, I remember getting a
12 message that is services had been terminated.

13 MR. RANK: He was fired and was not going to
14 go forward with the plea at that time. And Your Honor,
15 it is at that point in time I began to wonder and take a
16 look at the bigger picture of the person, because the
17 rational decision at that time, the reasonable decision
18 at that time based on all of the evidence before him
19 would have been to go forward with the plea agreement.

20 And the actions of Mr. Ardolf since that time
21 period has demonstrated that he is not a rational
22 person. That he is not only not a rational person, but
23 he is a dangerous person. And the more we look into his
24 background, his conduct, his conduct not only with
25 respect to the victims in this case, the Kostolniks, but

1 also with his former neighbors, the Carstens; that that
2 says much about Barry Ardolf, personally.

3 And Your Honor, one of the primary goals of
4 sentencing, I think in this case, from my perspective
5 the most important goal of this sentencing is to protect
6 the public from threats. Public in the form of the
7 Kostolniks who you've heard from today, who very
8 reasonably, very legitimately are concerned for their
9 safety whenever Barry Ardolf is released from prison.
10 But, not just the Kostolniks, but other people. I think
11 the track record, the conduct in this case of Barry
12 Ardolf demonstrates his propensity, his capability of
13 causing harm, using his technical skills in a way to
14 avoid detection and to cause as much calculated harm as
15 possible. Not an isolated incident, not a temporary
16 lapse in judgment. Something that took place over a
17 long period of time with more than one victim.

18 Barry Ardolf is a proven threat. He is a
19 person who has behaved with no concern for the harm he
20 has committed, both while he was doing it, and I think
21 more importantly, Your Honor, in assessing those 3553(a)
22 factors, his conduct since his crimes were discovered,
23 after he was originally -- the search warrant was
24 executed, after he was charged, and his conduct up until
25 today, that is the person that is before you.

1 We have seen in the course of the things that
2 he has filed, he has no concern when it suits him to
3 disparage the victims, to point the finger back at them,
4 to lie about his own actions in a way that shows,
5 contrary to the statements here today, that he has no
6 feelings of remorse.

7 I am concerned for the victims in this case.
8 I am concerned, Your Honor, for anyone who angers Barry
9 Ardolf, because we have seen what happens when they do.
10 Your Honor, I'm not going to be able to describe the
11 impact on the Kostolniks any better than Matthew
12 Kostolnik and Bethany Kostolnik did. You've heard what
13 they went through. You have heard how long and how deep
14 that the pain has been caused by Barry Ardolf and
15 continues until today.

16 I can't imagine what it was like for them in
17 the months between February and July of 2009 before it
18 was discovered that it was Barry Ardolf who was
19 targeting them, waiting for the next attack, knowing
20 that someone had breached their own home.

21 And I don't know what it would have been
22 like, I can't imagine what it would have been like to
23 wait for the next few months before he was charged while
24 he was living next door, the weeks after he decided to
25 withdraw his guilty plea, and even today when he has

1 members of his family living right next door.

2 And I know that the Court today has to come
3 up with a number. And in some ways, often when we are
4 assessing Sentencing Guidelines, there is a mechanistic
5 approach to that calculation. One of the exercises is
6 we spent the morning looking at enhancements and doing a
7 little of that number punching.

8 And I think it is important, while those
9 numbers are relevant, and the fact that there was child
10 pornography used, kind of cravenly in this case used, is
11 relevant; but, I think Your Honor is absolutely correct,
12 this is not a child pornography case.

13 This is a case that is based on the actions
14 Mr. Ardolf took to terrorize, to cause immeasurable harm
15 to the victims in this case. And what I take from, I
16 couldn't have expressed it any better than the
17 Kostolniks did, is that the numbers that the Court is
18 considering for a sentence are not random numbers. They
19 are not arbitrary numbers. They are real numbers, they
20 are meaningful numbers. And when Matthew Kostolnik
21 marks the time in prison for Mr. Ardolf as a yardstick
22 of his family's safety and feelings of safety, those are
23 real numbers, those are real meaningful numbers.

24 They mean feelings of safety for Matthew
25 Kostolnik, for Bethany Kostolnik, and for their

1 children.

2 Your Honor, when the PSR's guidelines
3 reflected a range of up to 293 months, the Government
4 suggested that that was an appropriate prison sentence,
5 293 months, and also indicated in our position pleadings
6 that if the Court disagreed with any of the numbers, any
7 of the guidelines calculations in the PSR --

8 THE COURT: I could still end up in that
9 neighborhood.

10 MR. RANK: That is correct. But, we would be
11 moving for a variance or a departure. And the reason I
12 thought that the 293 number made some sense is that
13 ultimately, as Your Honor mentioned earlier, that there
14 was only a portion of that sentence that is going to be
15 done, and we'll end up with a rounded 20-year sentence.

16 The 293-month number made sense for that
17 reason. And the reason behind that is to put Mr. Ardolf
18 in a position where he can't do the same thing to other
19 people. And I would submit, Your Honor, that based on
20 the actions in this case, based on Mr. Ardolf's actions
21 in this case, based on the assessment of what he has
22 done and what he is likely to do, that is the
23 appropriate sentence in this case, a sentence of around
24 293 months, which will do what in this case is the most
25 important thing, and that is to protect the safety of

1 the victims in this case and protect the safety of
2 future victims of Mr. Ardolf.

3 THE COURT: Let me ask you a question. And
4 Mr. O'Brien may or may not -- or Mr. Ardolf, if they
5 want to respond, I guess they could. Obviously, apart
6 from what the sentence is that I will soon announce, I
7 have an option that the State Courts don't have, and
8 that we utilize here frequently, and that is putting a
9 defendant like Mr. Ardolf on supervised release for the
10 rest of his life. And then putting him on, basically,
11 no computer use without heavy monitoring and a GPS
12 system where we know where somebody is 24 hours a day,
13 7 days a week, because obviously you will see that more
14 in child pornography cases. And I don't think people
15 have really discussed this in a computer case.

16 But, obviously, in any computer case with or
17 without child pornography, that is a fairly common
18 condition. And then if somebody -- so we know where
19 somebody is. And maybe that is one of the reasons why
20 our numbers are less than one out of three people are
21 ever brought back on a violation in our Court. I think
22 that is closer to two out of three in maybe State Court.
23 We are just two different courts, but one is not better
24 than the other, but we have that option. I assume no
25 matter what the sentence is, that you are assuming I am

1 going to consider some strict conditions like that, the
2 idea being, after X number of years on release if there
3 has been flawless compliance, the Judge may discharge
4 early, may not, but can step away with notice to
5 everyone. Do you have a view on that?

6 MR. RANK: Well, if what the Court is asking
7 is whether supervised release can be a substitute for
8 incarceration, I would have strong feelings about that.

9 THE COURT: I wasn't saying one was a
10 substitute for another, but I think the issue comes up
11 especially in cases like this where, increasingly, going
12 to significantly long periods, and because GPS
13 monitoring, computer monitoring, has gotten so
14 inexpensive and so sophisticated, it is more the rule in
15 the Federal Court at least in this District, than it is
16 the exception.

17 MR. RANK: Your Honor, I believe Mr. Ardolf
18 should be subject to a long term of supervised release,
19 but I think also the facts of this case will demonstrate
20 the supervised release will likely be worthless in the
21 sense of monitoring and proactively preventing him from
22 engaging in conduct.

23 THE COURT: Why don't you say what you are
24 thinking? You are thinking that Mr. Ardolf has behaved
25 like somebody who -- and this isn't a criticism of

1 you --

2 MR. RANK: Yeah.

3 THE COURT: -- but he is behaving like
4 somebody who is smarter than law enforcement, who is
5 smarter than computer people, and he will find a way to
6 outsmart. I mean, that has really been one of the
7 themes, apart from today, the theme through the case is
8 that, well, I can -- I know the system. I can outsmart
9 these people. You haven't said it in this hearing, but
10 if the threats hadn't been made to the White House, the
11 Anoka County and the BCA admitted, they didn't have a
12 sophistication to catch computer hackers at this level,
13 it took the FBI coming in, and the only reason they were
14 here was the threat to the White House, not the child
15 pornography. So --

16 MR. RANK: Your Honor, actually the FBI did
17 get involved based on the child pornography.

18 THE COURT: Early on, but they came in, and
19 their system -- I was actually surprised when the BCA
20 admitted -- I knew that was the county situation, but
21 when the BCA admitted that we don't have the kind of
22 equipment that could detect those things, yet.

23 MR. RANK: To get to the Court's point.

24 THE COURT: Yes.

25 MR. RANK: Twofold, one is yes, I think you

1 are exactly right, Your Honor, that he believes he can
2 outsmart law enforcement. And two, we know that he
3 doesn't respect the Court's guidelines, because he
4 violated the conditions of release imposed on him for
5 his release within a couple of weeks of being released
6 in using a laptop computer which he was told not to do
7 and going to a Borders Book shop and accessing the
8 internet.

9 The problem with this concept of supervised
10 release even with GPS monitoring and all sorts of
11 monitoring, by the time Mr. Ardolf is released from
12 prison, right now accessing the internet can be done on
13 a device that is this big (indicating approximately cell
14 phone size).

15 THE COURT: That is true.

16 MR. RANK: So I don't know what sort of
17 technological advances are out there. I will ask, and I
18 haven't gotten to this point yet, but I do think it
19 important when the Court is fashioning his sentence, and
20 also making recommendations to the Bureau of Prisons,
21 that Mr. Ardolf be prevented from having access to
22 computers and internet while he is in prison, and also
23 be prevented from further vocational and technical
24 training when he is in there because it is akin to
25 giving a bomb maker access to chemistry classes; that he

1 should be prevented from having access to that while he
2 in the BOP.

3 The point though that the Court originally
4 raised is, yes, he should be on supervised release.
5 But, do I think that that is going to prevent him from
6 causing harm to someone that angers him in the future?
7 Absolutely not. I think the only thing that is going to
8 do that, the best thing that a going to do that is a
9 lengthy term of incarceration.

10 I think supervised release is important, that
11 there be some additional time that is out there. But,
12 based on what I have seen, do I think that will deter
13 him for one moment? No.

14 THE COURT: All right. Mr. O'Brien, with or
15 without -- or with consultation with Mr. Ardolf, is
16 there --

17 MR. O'BRIEN: Well, obviously, Your Honor, I
18 don't share that jaundiced view of Mr. Ardolf. And I
19 also think that after several years in a -- at least
20 several years in a federal prison that any arrogance,
21 any misplaced arrogance that Mr. Ardolf has right now is
22 just going to be dissipated to a great extent.

23 And my last point about the supervised
24 release, Your Honor, I will defer to the Court on that.
25 But, I would note that when Mr. Ardolf gets out of

1 prison, the computer world is going to be so different
2 than it is now. He is going to be so out of touch. I
3 don't see the threat that Mr. Rank does. But, I am sure
4 a reasonable period of supervised release would be
5 appropriate, and Mr. Ardolf will be properly monitored.

6 THE COURT: Mr. Ardolf, do you have anything
7 else you want to add to what Mr. O'Brien has said?

8 (Discussion off the record between the
9 Defendant and Mr. O'Brien.)

10 THE DEFENDANT: I have no prior convictions.
11 I would like an opportunity not to be in prison. I know
12 people get opportunities. That is all I have.

13 THE COURT: All right, thank you. You can be
14 seated at counsel table. What I will do, consistent
15 with other cases, at least, how I will proceed, I will
16 respond, generally, to both the position papers, even
17 though it has been a long hearing for everyone, and to
18 the arguments that have been made.

19 And then what I will do is explain before we
20 come to the podium what the sentence will be, because
21 most people don't like standing at the podium. And the
22 imposition of the sentence, itself, takes a couple of
23 minutes.

24 First of all, there are some things that I
25 think no one is in disagreement about. The issue isn't

1 whether they happened, the issue is what effect it
2 should have on the sentence.

3 The first one is, that is not unique to this
4 case, although it is probably very, very severe in this
5 case, so it is probably a good thing, Mr. Ardolf, you
6 apologized to your family. Most defendants do, some
7 don't. The public, unless they come to the courtroom
8 think unless there is some violent crime, there's no
9 direct victims. And, of course, what people know who
10 work in the justice system is in every case the most
11 direct victims in so many cases are the children of a
12 defendant, because many parents commit crimes, make
13 mistakes.

14 And so, it is always on the mind of a judge.
15 I am certain that when the sentence is done in just a
16 few minutes that there will be people with some
17 justification in the courtroom, from your family, who
18 will feel that I have disrespected in some way, if not
19 you, your children and family, because they lost their
20 mother at a tender age, and now their father.

21 Although, as I said, and I think you meant it
22 sincerely, but when I quoted earlier, when you are
23 telling your son how to write his letter to me. You can
24 cry about how you lost mom, now you are losing dad. The
25 better the letter, the smaller the jail time the Judge

1 will give me.

2 It's true it is heavy on most judges, and it
3 should be, the effect on the children. But, that
4 probably goes to explain some of the concerns that Mr.
5 Rank had that you were that single dad in the home when
6 I don't need to figure out all of the reasons you did
7 all of these really unspeakable things to the Kostolniks
8 and perhaps others. But, knowing that you are the role
9 model, you are to set an example. And I think we
10 probably in this room agree on one thing, many of us
11 will be judged at the end of our lifetime on the kind of
12 examples we set for our children, those of us lucky
13 enough to have children. And knowing that this could
14 put you in harm's way. But sadly, many people have been
15 before you, and not on this exact crime. So, I do
16 acknowledge, and your children have written very sincere
17 letters, apart from the differing views on the influence
18 you may have had, that aside. They are obviously asking
19 for some type of compassion and leniency.

20 And so, I am just acknowledging that I know
21 that they are very directly affected by this. And some
22 would suggest, and I won't -- it won't play any part in
23 my sentence, that apart from the Government's offer or
24 what you end up doing, that not just the best interests
25 of the Kostolniks and their family, but the best

1 interests of your children would be served if you work
2 something out on the forfeiture. It won't play a part
3 in my direct sentence in the case. And I am hopeful
4 that happens, because I think it is very difficult for
5 members of your family, no matter what the sentence is
6 and what people think of me in a few minutes, or the
7 Kostolniks or others, with people living side by side,
8 so we will see where that goes. But, I am mindful of
9 the effect on your children in the case.

10 And I don't make moral judgments. Judges
11 take an oath not to. I don't have to impose the
12 sentence I am going to impose, and I can conclude that
13 you may pose a danger which your lawyer and you take
14 strenuous issue with and your family, but that is not
15 the equivalent of saying, well, I think he is a bad dad.

16 I said my peace on the role model part, and I
17 will probably leave it there. I will probably never
18 know, having been, you know, with the case for some
19 time, whether it was obsession or compulsion, that
20 really apparently blinded you to the effect this would
21 have on your children, that you almost at all costs went
22 out to destroy one or more families, and at all costs to
23 them and at all costs to you and your family.

24 And there are some who have suggested, and I
25 don't say this to upset you or other family members, but

1 there are some who have suggested one consistent theme I
2 have had from everything I have read is that your late
3 dear wife who met such an unexpected and untimely death,
4 I think, at the age of 37, my memory wants to tell me
5 November 6th of 2000, on that very tragic day the theme
6 has been that she was the best thing that ever happened
7 for you. And the two of you were deeply in love, and
8 that she really was a stable, stable force in your life.

9 And that it is so difficult to lose someone
10 close to you, and that you were never the same person
11 after that. Nobody was making any excuses for you, but
12 they were more talking about they saw a different Barry
13 Ardolf. So, I really accept that. The issue isn't
14 whether that may be -- and to your credit, I don't
15 believe you have made that as an excuse for what has
16 happened here, that I have seen. But, a lot of people
17 noted that a lot of things changed back there, back
18 then, way over and above being a child just to a single
19 parent. So, that is also in my mind.

20 I think there is a disconnect for some folks
21 in the case. Obviously, the letters that I have read
22 describe you as a very intelligent person. And I think
23 most of us if we were raised at all with proper values
24 don't judge people on the number of fancy initials
25 behind their name. My dad had an eighth grade education

1 and was a very smart, intelligent, decent man. And I
2 certainly never judged him, and he raised me not to
3 judge others, which seems to be consistent with the oath
4 I promised to uphold. So, I think that has been pointed
5 out to me by a number of friends, family, siblings,
6 children.

7 I do have to take exception, and I say this
8 with all due respect, it seems like you have been more
9 involved than you should have been in asking to proof
10 the letters that people were going to write to the
11 Court. The letters are important, and I haven't really
12 seen that type of involvement over my career. But,
13 there may have been good reasons for it. I have tried
14 to understand that.

15 The fact of the matter is, here is where we
16 are. I have an advisory set of guidelines, based upon
17 my findings, and I will just note briefly, that was
18 where I started off some time ago, was 151 to
19 188 months, not counting the two-year consecutive
20 sentence on two of the counts that would be run
21 together. And that was, of course, made over the
22 objection of you and your lawyer who felt it should be
23 closer to 50 or 60 months, and over the objection of the
24 Government who thought I should be at 235 and up
25 somewhere. And so, let me go right to the heart of the

1 matter.

2 The Kostolniks have done what most decent
3 innocent victims would do. They have asked for up to
4 the maximum, which could be over and above the 235 to
5 the 293 months. It could be as high as 44 years.

6 You and counsel and family have asked for
7 something closer to five or six years or less. In
8 fairness to your children, they've asked that whatever
9 happens, that I recommend a facility here in Minnesota.
10 The reality is, whether the sentence is closer to what
11 you have asked for or what the Kostolniks and the
12 Government has asked for, I can't restore the peace of
13 mind, the security, the serenity that you have taken
14 from them by the -- really, almost indescribable terror
15 that you subjected them to over the years.

16 And I want to talk about the child
17 pornography. I would agree with your lawyer, and now
18 Mr. Rank has also said, well, it is true this really
19 isn't a child pornography case. And there is much talk
20 separate from this case about the Guidelines that are
21 quite significant in child pornography. But, I actually
22 think this case on how you used that one particular
23 picture is worse than a child pornography case.

24 In other words, we had four threats to the
25 White House. We had a hoaxing, saying -- to the legal

1 assistant for Mr. Kostolnik. We had a come on and
2 proposition by a William Mitchell law student, all
3 purported to come from the victim.

4 And then, yet the uncanny understanding by
5 you, unlike most child pornographers, how truly
6 damaging, indescribably damaging it is to put this child
7 pornography out, because even you decided, when it went
8 out on the internet, to cover the face of the three
9 children, which is an acute understanding of what can I
10 do -- what on the face of this earth will damage and
11 destroy the Kostolniks more than anything I can think
12 of, sending their employer -- victimizing these
13 children, worse than if it was for personal
14 gratification. That is why the computer hacking
15 guidelines don't give me a lot of guidance. It isn't a
16 child pornography case, but knowing that when people see
17 these victimized children, that is why your conscience
18 apparently told you to whiteout their faces on the
19 internet, but not when it went to the law firm.

20 You transmitted, when the threats weren't
21 working and nothing else was working, nothing seemed to
22 be happening that would adversely affect the Kostolniks,
23 you sent a picture of two juveniles engaged with or
24 without force in oral sex penetration with a juvenile
25 girl. And it had -- so, in many ways, that is far worse

1 than sending it to someone for personal gratification,
2 because you are intelligent enough with enough insight,
3 at least at that time, to know what is the one thing I
4 can do to try to destroy these people because the
5 threats to the White House don't seem to be working, the
6 affairs don't seem to be working. Let's try child
7 pornography.

8 And to do whatever that you could, in my
9 judgment, to destroy them in any way you could -- I
10 don't know why else someone would send that picture and
11 then have it "Matt's Kids" on the top. That is why,
12 like I said earlier in this proceeding, people can do
13 more damage with computer hacking, especially when they
14 use a picture like that, than they can with a gun or
15 they can with drugs. And I can't avoid some of the
16 unwarranted disparities, the sentencing disparities in
17 other cases, but I will be responsible for mine and any
18 other sentences I have imposed. But, I actually think
19 it is more serious than a standard -- so, ironically,
20 the computer guidelines seriously understate the
21 seriousness of what these people have been through and
22 what you have done, and the child pornography
23 guidelines, maybe to an extent overstate it, because it
24 is not really a child pornography case unless I do take
25 into account, which is a significant factor, sending

1 this to the employer. But, yet having a full
2 understanding, as I said before, how totally damning it
3 is, so you cared enough about those kids when it went to
4 the internet, if not for the Kostolniks to cover their
5 faces, if nothing else, as you kind of pointed out on
6 one of your questions of Agent Cameron.

7 So, where does that leave us today? Where I
8 am left with because of the Guidelines you all heard me
9 reference two or three times earlier in the day, well
10 even without the mandatory consecutive two years which
11 you and your lawyer strongly objected to, even without
12 the finding the ten images rather than something less
13 than that objected to, although I went to a 34 level,
14 not 38 on the sadistic nature of the photographs for the
15 reasons I stated.

16 I had said a couple of times, well, under the
17 3553(a) factors, I believe no matter how I calculate
18 those issues, I am going to end up at the same place.
19 And what I mean by that is this. What is that sentence
20 that will promote respect for the law, seems to fit the
21 crime -- even though I can't restore for the victims the
22 peace of mind and the serenity that America is known
23 for, and to be free from that type of terrorizing.

24 What is that sentence that will also avoid
25 unwarranted disparities and deterrence -- both lawyers

1 brought it up. There are two types of deterrence. And
2 both are present in this case. Both usually aren't.
3 The one that is always present is what I call general
4 deterrence saying, we need to say to our community and
5 our public when this happens, here is how serious we
6 think it is, and take into account who the human being
7 is in front of me. As you said, you have no prior
8 record.

9 And then secondly, over the -- your lawyer
10 has spent some time, or your standby counsel has spent
11 some time on, as you have, saying: Well, that is one
12 deterrence, but the individual deterrence, you really
13 don't need to protect the public from Mr. Ardolf, which
14 is a contrary view of the Government. This is one of
15 those rare cases that I get where until I can have an
16 understanding of what compulsively and obsessively drove
17 you for so long, because that incident on the front lawn
18 would not drive a normal person to do any -- most of
19 what happened here with the Kostolniks, no matter what
20 the perceptions were.

21 I believe until I have an understanding of
22 that, that you are at high risk, whether you have some
23 self control. But, I believe a sentence has to address
24 both types of deterrence. And today, my view is -- the
25 bottom line is this. Whether I was required to give the

1 two-year consecutive or not, anything less than a
2 216-month sentence would not promote respect for the law
3 and provide the proper deterrence. And that is
4 192 months, or 16 years. The Guidelines calls for 151
5 to 188, and because of the way in which the child
6 pornography was used, the Guidelines didn't contemplate
7 that. I am going a bit over the high end, 192. And a
8 two-year consecutive sentence on the aggravated identity
9 theft, but I also find that even if it was discretionary
10 with me, and I was not required to give a two-year
11 mandatory sentence, I would give a sentence of
12 216 months, because anything less than that would not,
13 in my judgment, serve the purpose of sentencing.

14 Is the Government entitled to -- should they
15 be reasonable in asking for at least 293? Yes. I
16 balanced the factors and found that this is sufficient,
17 but not greater than necessary to serve all functions of
18 sentencing. And I am going to put you, and I will lay
19 out the conditions in just a moment when we come to the
20 podium. I am going to put you on 20 years supervised
21 release, and I will lay out the conditions.

22 And then in the event after -- whether that
23 number, without promising anybody in the courtroom
24 anything, whether it is five years, whether it is ten,
25 if somebody says: Well, really, everybody has been

1 flawless. Mr. Ardolf has been fully compliant with
2 everything. Whether there should be an earlier
3 discharge than that, and there will be GPS monitoring,
4 strict computer control. I need to leave the courtroom
5 today believing that you are in the group, in that group
6 that is less than one out of three that ever returns
7 here on a violation again, because that is the
8 statistics in our District.

9 So, for those that feel anything less than a
10 300-month or more sentence is inappropriate, I mean no
11 disrespect. For those loved ones or family members of
12 Mr. Ardolf who feel that anything more than three to
13 five years is unreasonable and unfair, not giving Mr.
14 Ardolf the second chance, I am fully responsible for the
15 sentence. I won't be apologetic about it. Because I
16 can't restore everybody to where they were before this
17 happened. I don't think any sentence can do that.

18 So, if Counsel, and I will talk to each of
19 you, and Mr. Ardolf and Mr. O'Brien and Mr. Rank if you
20 would come to the podium? Or Co-counsel? I didn't mean
21 to neglect your Co-counsel, there. And we will stop for
22 any requests for clarification at the end of the case.

23 As the sentence of this Court and judgment of
24 the law, I commit you to the custody of the Bureau of
25 Prisons for 216 months. And let me break that down,

1 then I will stop. This term consists of 60 months on
2 each of Counts 1 and 6, 120 months on Count 4,
3 192 months on Count 5. Those will be served
4 concurrently.

5 An additional 24 months shall be served
6 consecutively on Counts 2 and 3 with one another,
7 concurrently, but consecutively with the terms Counts 1,
8 4, 5, 6, which is a complicated way for the record of
9 saying it is 216 months. It is 192, as I stated with
10 the 24 months consecutive. But, I want to say
11 alternatively that even if I had concluded that the
12 consecutive sentence was not required, I would still end
13 up at 216, because I don't believe anything less than
14 that would promote respect for the law and serve out the
15 3553(a) factors.

16 Does either counsel have a question about
17 that computation, itself? Mr. Rank?

18 MR. RANK: No.

19 THE COURT: I am not asking people to agree
20 to it, because you both object to it, but to the
21 computation, itself.

22 MR. O'BRIEN: No, Your Honor.

23 THE COURT: I am going to order a fine in the
24 amount of \$10,000. That should be paid within
25 three months of today's date.

1 In the event there is a forfeiture agreement
2 reached, notwithstanding any decisions I make today
3 where you want to build that in to any forfeiture
4 agreement, then I assume I will be notified. Otherwise,
5 I base that upon the financial circumstances of the --
6 of the Defendant.

7 Forfeiture, noting the objection of the -- of
8 the Defense, right now where it is, Mr. Rank has said
9 for some time, desired that the Defendant's home be
10 voluntarily sold, or otherwise they are going to pursue
11 and have pursued, in addition to the computers, and I
12 will talk about the contents of the computers in just a
13 moment on one issue raised by the children and Mr.
14 Ardolf.

15 What is the Government's request on the
16 forfeiture today? And I have a preliminary order of
17 forfeiture and Mr. O'Brien had asked me to sit tight, so
18 to speak, until today's hearing.

19 MR. RANK: Your Honor, Mr. Alexander from our
20 office is present, so he will correct me if I get any of
21 this wrong.

22 THE COURT: I am sure he will.

23 MR. RANK: We filed a Motion for Order of
24 Forfeiture.

25 THE COURT: You did.

1 MR. RANK: And we ask that the Court enter
2 that Order of Forfeiture today. There is a difference
3 between getting the Order of Forfeiture and actually
4 taking the house.

5 THE COURT: That is true.

6 MR. RANK: What we would ask the Court to do
7 is rule on the Order of Forfeiture. We will get it in
8 hand. And based on that, we will continue in good faith
9 to try to reach a resolution where the house can be
10 sold, and the proceeds of the house be put into a trust
11 for the benefit of the children. As we have before.

12 But, what I don't want to do is what counsel
13 suggests, is moving this forfeiture matter out at any
14 time. Forfeiture is a component of sentencing, as Mr.
15 Alexander has told me many times, because I don't really
16 understand all of the legal aspects of forfeiture.

17 But, we ask the Court to enter that order of
18 forfeiture. We will then have it and we can continue to
19 try to resolve it in the same way we have been trying to
20 resolve it for the last several months.

21 THE COURT: Mr. O'Brien?

22 MR. O'BRIEN: May I consult with Mr. Ardolf?

23 THE COURT: Yes.

24 MR. O'BRIEN: Your Honor, Mr. Ardolf wanted
25 to clarify that there was still room for negotiation, so

1 that the children aren't put on the street right away,
2 that there be some --

3 THE COURT: Well, it takes some time, even
4 when there isn't an objection, as you know, Mr. O'Brien,
5 even when there is an objection. In fact, if anything,
6 sometimes the Court, and maybe the Justice Department is
7 criticized for not moving -- maybe not from a
8 defendant's point of view. But, I think that will take
9 care of itself, even if Mr. Rank hadn't kind of given
10 his word that he will try to negotiate something.
11 Because, I will likely, over your objection, just so I
12 don't claim there is a stipulation here today, order the
13 forfeiture. But, the children are not going to be sent
14 out of the home in the immediate future. That is not
15 the way it would work -- maybe that is the way it should
16 work, assuming the house is empty, but that isn't the
17 way it would work, even if there was nobody in the home,
18 much like some foreclosure and other procedures that
19 always take longer than the public thinks that they
20 should take.

21 I would just say this, while it has played no
22 role in my sentence, I believe that whether the issue is
23 how to deal with all three children or some other
24 issues, I believe that the right thing for all the
25 people involved would be to work out some agreement.

1 And the Government has agreed to try to work with you.
2 I mean, I am not a party to those negotiations, but
3 they've said in writing -- and I didn't realize for how
4 long, to say, look it, we won't try to take any part of
5 the house, other than the computer equipment. If there
6 can be some arrangement worked out to turn it over and
7 put it in trust for -- sell it, and put the proceeds in
8 trust for -- and I will use the phrase the children,
9 because maybe that is one of the issues, that is more to
10 workout between the parties. But, if I can be of some
11 help or the Federal Court can, there are certain things
12 appropriate for us to do, and certain things not. But,
13 I think one concern Mr. Rank, you and co-counsel can --
14 this takes some time. And so, I don't think that should
15 be a fear -- I mean, I think some decisions should be
16 made, a yes or a no, because then I think there can be
17 some time frames given to all of the members concerned.
18 And unfortunately, probably to most people, it takes
19 longer, even when an agreement has been reached or a
20 court decision, to process this thing through. So, I --
21 until someone could persuade me differently, I mean, I
22 will -- I mean, I think that there is a lot of merit to
23 whether this was the dream house for people or not, to
24 sell the house, put it in an arrangement that seems fair
25 to your client and family and acceptable to the

1 Government and move on, and let the Kostolniks live in
2 peace, to the extent they can.

3 MR. RANK: Your Honor, I would ask also that
4 the arrangement -- we would be able to deal with Mr.
5 O'Brien, and Mr. O'Brien is the person that is going to
6 be working with us in terms of putting together a trust.
7 I think it will be a lot more efficient and make it more
8 likely that we are able to reach something.

9 THE COURT: If that is with Mr. Ardolf's
10 consent, until it is withdrawn. So, in other words, he
11 wants a contact person because there are things that
12 they can say and do with a lawyer, or another person
13 that is not proper for them to sit down face-to-face
14 without you having someone there, Mr. Ardolf. It is not
15 unique to this case.

16 Would you -- obviously, Mr. O'Brien, would
17 you agree to help out there if it is with Mr. Ardolf's
18 consent and continue your limited involvement in that
19 regard?

20 MR. O'BRIEN: Certainly, Your Honor.

21 THE COURT: Do you want to think about that,
22 Mr. Ardolf? I am not asking you to agree to any
23 agreement on the house, but if for the time being Mr.
24 O'Brien could be involved to see if there is some
25 arrangement that can be worked out. And then if you

1 decide, well, there may be, but I am not going to
2 utilize Mr. O'Brien, then that is your decision to make.

3 THE DEFENDANT: Yes.

4 THE COURT: All right.

5 MR. O'BRIEN: Your Honor, if I could, I was a
6 little confused about Court's comment on the interaction
7 between the fine and the selling of the house.

8 THE COURT: I am just saying, I have imposed
9 the fine, but I would hate to see -- and I base it on
10 the ability of Mr. Ardolf to pay. I would not want to
11 see that get in the way of -- in other words, if you are
12 all somewhere saying, we can agree on a forfeiture, but
13 why does the Judge have to impose a \$10,000 fine, I
14 suspect I can work with counsel if you would approach to
15 me and say, you know, that has become an issue in the
16 case. We can resolve this. But, are you willing to
17 vacate that fine? It would have to take some
18 arrangement between the parties coming to me, but I
19 would not want that to stand in the way.

20 But, that would have to take everybody coming
21 to me saying, we have worked this thing out, but it may
22 seem minor to you, Judge, but that is standing in the
23 way. But, I assume you will all let me know if and when
24 that happens. So --

25 MR. O'BRIEN: I appreciate that, Your Honor.

1 THE COURT: I am going to sentence you, Mr.
2 Ardolf, at this time. I don't make any claim -- and so
3 I will then sign that Order of Forfeiture and then the
4 time frame can be communicated to everyone because there
5 are issues with that that don't vary dramatically from
6 case to case, because there is a set procedure in
7 fairness to everyone. And like I said, if there is a
8 complaint by affected people, it usually takes too long.

9 I sentence you to a term of 20 years, and
10 that is total of supervised release. That consists of
11 one year on each of Counts 2 and 3, and this may seem
12 highly technical, but I have to indicate what goes with
13 each count, three years on each of Counts 1 and 6, and
14 15 years on Counts 5 -- on Count 5, and 10 years on
15 Count 4, all to run concurrent. So, even though I had
16 to break those down, because there are limits on each
17 count, there is a total -- I meant to say 20 years on
18 each of Counts 4 and 5, because they are the only ones
19 that permit me to do that. And actually, Leah, it's
20 actually 20 years on Count 5 and 10 on Count 4, I
21 believe. But the key, here, the total is 20 years,
22 total.

23 More importantly to me, with that, is if you
24 haven't made other arrangements with the Probation
25 Department, and I predict you will have, at the time of

1 your release, you will report -- if you haven't made
2 arrangements, you will report to your probation officer
3 at the time of your release. Second, you shall not
4 commit any crimes, be they federal, state or local.

5 Third, you shall not possess a firearm,
6 ammunition, destructive device, or other dangerous
7 weapon. You shall cooperate as every federal defendant
8 has since October of 2004 with the collection of a DNA
9 sample, and there are some additional requirements
10 because it is a child pornography case. But, the DNA
11 sample is unrelated to that. It is every federal felony
12 since October of 2004.

13 You shall comply with the requirements of the
14 Sex Offender Registration Act, that is federal law, as
15 directed by the probation officer and the Bureau of
16 Prisons, or to any state sex offender registration
17 agency in which you work, reside.

18 Now, it is true, there is a lot of
19 controversy, apart from this case in this country and
20 state on what is a qualifying offense, and whether child
21 pornography should be considered a qualified offense for
22 sex offender registration, but it is also true that in a
23 large majority of states it is a requirement. And under
24 federal law it is a requirement, and probation will work
25 with you on that.

1 You shall abide by the following additional
2 condition of supervised release, which I consider as
3 important or more important to the ones I just
4 mentioned. First you shall abstain completely from the
5 use of alcohol and other drugs, and not frequent
6 establishments whose primary business is to sell
7 alcoholic beverages. There has been some discussion --
8 it didn't play a role in my sentence, that there may
9 have been historically, not associated with this
10 offense, any alcohol issues. And if we screen you, Mr.
11 Ardolf, and there is no identifiable problem, we will
12 step away from it. We won't do this just to run you
13 through the drill to say we have done it. Consequently,
14 we will have a full evaluation, and then if there is an
15 identifiable issue, you shall participate in a program
16 for alcohol abuse as approved by Probation. That will
17 include testing, inpatient, outpatient treatment,
18 support group work. And you shall contribute any cost
19 to that based upon -- as a co-payment pay program
20 consistent with your ability to pay.

21 You shall provide the probation officer any
22 access to any requested financial information, including
23 credit reports, credit card bills, bank statements, and
24 telephone bills. More importantly to me, you will
25 refrain from accessing or committing any acts that are

1 consistent with what you pled to, and I will be very
2 specific now. You shall have no contact, direct or
3 indirect, with the victims in this case. And I define
4 contact as follows: No letters, no third-party contact,
5 no communication devices, audio or visual, no visits,
6 and no -- and whatever request there is made cannot be
7 done without the prior consent of the Probation
8 Department.

9 You shall be prohibited entirely from
10 engaging in any computer-related occupation during the
11 term of supervision without the prior approval of the
12 probation officer. And this doesn't mean I am assuming
13 that you were doing computer-related work at Medtronics,
14 because that has been one of your complaints that people
15 kind of designated you as a computer expert at
16 Medtronic. I never said such a thing. But, we want to
17 know what the employment is and what the request is, and
18 it is a violation of your supervised release for the
19 probation officer not to know.

20 And it is the rare case, Mr. O'Brien can
21 confirm to you in private that a Defendant comes back to
22 us or through a lawyer and says, the probation officer
23 and the Court is totally unreasonable. They put me in a
24 corner and won't let me out. They need to know before
25 you do something, not after, and we can generally work

1 things out.

2 You shall participate in any recommended
3 psychological or psychiatric counseling or treatment.
4 Again, that doesn't mean that I have decided that you
5 need a specific course, but it means that because
6 oftentimes State and Federal Courts are criticized for
7 not screening for this and trying to provide services at
8 the appropriate time, we'll screen for it and expect
9 that you will participate, if there is a recommendation
10 to be made. And that includes taking any medication
11 taken by your physician or your medical provider, as
12 well.

13 You shall register with the State Sex
14 Offender Registration Agency in any state where it is a
15 qualifying offense where you are living, or otherwise
16 employed. And again, the Probation Department will work
17 with you there, because it varies from state to state,
18 separate from the federal requirement. And Probation is
19 responsible to secure compliance with that.

20 More importantly to me, and I suspect to the
21 Government and to, at least the victims in the case, you
22 shall not possess or use a computer or have access to
23 any online service without the prior notice and approval
24 of the United States Probation and Pretrial Services
25 Office.

1 You shall identify all computer systems,
2 internet-capable devices, and similar memory and
3 electronic devices to which you have access and allow
4 installation of a computer internet monitoring program.
5 Monitoring may include, but is not limited to random
6 examinations of computer systems, along with internet,
7 electronic and media storage devices under your control.
8 The computer system or devices may be removed for more
9 thorough examination as a condition of your release, if
10 necessary.

11 You shall contribute to the cost of such
12 monitoring services based upon your ability to pay as
13 deemed appropriate by the Probation Department. I will
14 just say this to you, Mr. Ardolf, not to insult your
15 intelligence, one of the common violations these day,
16 because this is subject to the right of Probation to
17 place you on GPS monitoring, as well. It is very
18 inexpensive for us to utilize. One of the more common
19 violations, because the monitoring services have got
20 quite sophisticated, are to either use a third-party,
21 not necessarily a child. Or, the more common in pure
22 child pornography cases, which this is not in my
23 judgment is library. That is one reason we use GPS
24 systems, because the most common violation I have had is
25 people have been caught in libraries doing things,

1 without notice to Probation.

2 So, they need to know whether it is e-mail
3 connectivity, who knows what it will be when you get
4 out, with cell phones and the like, apart from
5 computers. You shall submit your person, residence,
6 office, vehicle, any area under your control, to a
7 search conducted by the U.S. Probation officer or
8 supervised designee at a reasonable time, and reasonable
9 manner, based upon, of course, reasonable suspicion that
10 there is a supervised violation occurring for contraband
11 or evidence.

12 You, of course, have an obligation in the
13 interest of yourself and any people you are living with
14 to tell them that things that you control and places you
15 live may be subject to this condition.

16 If you are not employed at a regular
17 occupation as you are released, and you have skills that
18 a number of defendants don't, apart from what has been
19 alleged in the case, we have a work program. In fact
20 our Federal defendants on supervision are employed at a
21 higher rate in our District than the rest of the
22 population. And if you are employed, we will sit tight;
23 if not, you will be required to perform up to 20 hours
24 of community service work a week until employed and
25 participate in other job counseling activities. It may

1 not be necessary in your case, but the fact is, while it
2 is true a number of employers won't touch some federal
3 defendants, or any defendant with a 10-foot pole,
4 increasing numbers do, as long as they are working with
5 us.

6 So, I impose a \$600 special assessment for
7 the Crime Victims' Fund, that is \$100 per count that has
8 been pled to, not subject to suspension or waiver,
9 separate from any fine issue. And I direct that that be
10 paid within 30 days.

11 I would note for the record that the victims
12 in the case have not requested restitution unless I am
13 told differently, Mr. Rank. That is where I will leave
14 it.

15 MR. RANK: That is correct, Your Honor.

16 THE COURT: You have a right to take an
17 appeal from this case and this sentence. If you can't
18 afford to hire a lawyer, one will be appointed to
19 represent you at the public's expense.

20 The notice of appeal must be filed within 14
21 days of me filing the criminal judgment, which will be
22 filed not later than Thursday, could be as soon as the
23 end of business day tomorrow.

24 I am assuming, Mr. O'Brien, and I would have
25 assumed this even if the children hadn't put it in

1 letters to me, that you are asking me to recommend a
2 facility here in Minnesota?

3 MR. O'BRIEN: That is right, Your Honor.

4 THE COURT: I will recommend -- I assume you
5 have no objection to that, Mr. Rank?

6 MR. RANK: No. I have some other thoughts
7 for recommendations to the Bureau of Prisons, but I
8 don't have any problem with placement recommendations.

9 THE COURT: I want to say this, I will
10 recommend a Minnesota facility. Because of the nature
11 of the offense, and that is what the Bureau of Prisons
12 in Texas will get. And it is not up to anybody in the
13 courtroom, including me. It is up to the Bureau of
14 Prisons. They make all decisions out of Texas. It
15 takes them two to three weeks minimum to make a
16 decision. It could be as many as four.

17 And you will find that all of the federal
18 prisons are easier time, not for the wrong reasons, but
19 for the right reasons in terms of freedom of movement,
20 services and other things that are available that aren't
21 available because the jail is a pretrial detention
22 facility. That is not what a prison is. So, actually
23 it will be easier time, not more difficult time in my
24 judgment. Prison is prison, but it won't be, I think,
25 as difficult.

1 I always ask the probation officer, even
2 though she won't be consulted, either. Nobody in her
3 department will. Sometimes if we know for certain that
4 they will ignore my recommendation, I just say that in
5 anticipation of full disclosure. Not likely Duluth, but
6 possibly Sandstone, perhaps?

7 THE PROBATION OFFICER: I am not exactly sure
8 what the designation would be, but I think either that
9 or Duluth would be probable.

10 THE COURT: Yeah, it is probable. And so, if
11 I know for certain but because of something in the case
12 or the record that I know that, well, we will recommend
13 it but the Bureau is not going to follow it, I would say
14 so.

15 Mr. Rank, do you have other recommendations
16 to make? Or requests?

17 MR. RANK: I do. Your Honor, I mentioned
18 this earlier, and I know the Court can only make
19 suggestions or recommendations to the Bureau of Prisons,
20 but I do have concern about ongoing vocational training
21 with respect to computers while he is in prison or
22 access to computers while he is in prison. And I ask
23 that the Court include that in his recommendation to the
24 Bureau of Prisons, that he not be given vocational
25 training or educational training in technical areas.

1 THE COURT: Mr. O'Brien, Mr. Ardolf, do you
2 want to be heard briefly on that?

3 MR. O'BRIEN: Well, the problem is that if
4 Mr. Ardolf is going to do any kind of educational
5 pursuit in prison, I think on computers, he should have
6 an integral part of that. Not that he is studying
7 computers, I think any kind of class would involve some
8 kind of computer use.

9 THE COURT: I think there is a solution. It
10 may not satisfy everybody. And then in the interest of
11 full disclosure, because temporary to what some people
12 may think in the courtroom, not unique to this case,
13 everybody doesn't do what a Federal Judge does or asks
14 them to do. And the Bureau of Prisons is right at the
15 top of the list, actually, for doing their own thing for
16 better, for worse. What I will suggest, I will put in
17 there that -- and I am going to do one thing, so it just
18 isn't words in a courtroom or in a criminal judgment.
19 No access -- and just let me be heard out here. No
20 access to the internet, no computerized training without
21 notice to the Court and Probation. Now, just let me say
22 this.

23 The Bureau is going to say, we don't -- and
24 their lawyers are going to say, we don't really -- once
25 he has committed Mr. Ardolf to us, we are going to do

1 what we want. What I am going to do, though, in
2 fairness to the Government and to the Defense, maybe we
3 can check with the Bureau and say, what will they honor,
4 what won't they? What services are available? So, I
5 may agree with them or disagree with them so I can get
6 back to counsel in the next couple of days and say, here
7 is what we learned from the Bureau, and here is what
8 they are going to do, or here is what they would have
9 done once they saw the criminal judgment without us.
10 Because I don't know what the reaction is going to be,
11 because we have had some issues, and I am not suggesting
12 there will be one here. But, can we make that overture?
13 And then we will get back to --

14 THE PROBATION OFFICER: Yes, I will follow
15 through on that.

16 THE COURT: And I will agree in the next few
17 days to get back, because sadly or not, it will take two
18 to three weeks at minimum for the Bureau to designate a
19 facility. So, and they have been taking a little bit
20 longer, recently. So, I will do that and get back to
21 both, and maybe to make sure it is done, I will put
22 something in writing to you, to you, Mr. O'Brien and a
23 copy to Mr. Ardolf. And obviously, if the victims or
24 other individuals want to know through Probation or the
25 U.S. Attorney's Office, well, what happened in light of

1 what the Judge said? I am sure that information can be
2 communicated to those involved in the case.

3 Did have you any other recommendations?

4 MR. RANK: Your Honor, if Your Honor places
5 that into the judgment --

6 THE COURT: I will.

7 MR. RANK: What it will do is it will be a
8 flag for the case manager and BOP, and at least have
9 some impact on the person looking into the background of
10 Mr. Ardolf and making some educated decisions on what is
11 appropriate.

12 THE COURT: And what I don't know is -- and
13 maybe we will get an answer that is acceptable to
14 everyone. Maybe we will get an answer saying, well,
15 here is our protocol when we see this.

16 MR. RANK: We probably won't.

17 THE COURT: We probably won't. That is my
18 thought.

19 MR. RANK: As long as it is a flagged in the
20 judgment, that will go a long way --

21 THE COURT: Let me ask the expert probation
22 officer if she has any other suggestion, realizing they
23 don't consult her, either.

24 THE PROBATION OFFICER: Nothing on the Bureau
25 of Prisons, but I would ask the Court to address

1 mandatory drug testing, if that should be --

2 THE COURT: Excuse me?

3 THE PROBATION OFFICER: If you could address
4 mandatory drug testing?

5 THE COURT: Well, the Court was -- until I
6 see an evaluation, other than what I ordered about the
7 no alcohol use. Until we get an evaluation that says
8 there's identifiable issues, then I would have the right
9 to impose it. I was going to suspend the mandatory drug
10 testing until I get a report, because right now we have
11 got -- even though we have got some family history that
12 may seem -- we have got really nothing that would
13 ordinarily justify that condition of mandatory drug
14 testing. So, Mr. Rank?

15 MR. RANK: I have nothing --

16 THE COURT: What I would do then is I would
17 suspend it with the understanding that if I get an
18 evaluation back that says, well, Judge, if you had this
19 information, you would have imposed that condition. I
20 always have the right to do that even if it wasn't
21 whispered here in the courtroom today. So, Mr. O'Brien,
22 do you want to be heard on that?

23 MR. O'BRIEN: Well, addressing potential
24 alcohol use, Your Honor, I think the probation officer
25 did identify some use of hard liquor which may --

1 THE COURT: That is true.

2 MR. O'BRIEN: Which may mean that Mr. Ardolf
3 could benefit from the DAP Program.

4 MR. RANK: I have strong objection to that,
5 Your Honor. I think that that is just simply a way of
6 kicking a year off his sentence in this case. There is
7 nothing in Mr. Ardolf's history to indicate that he had
8 any alcohol problems into his background that
9 contributed to the offense. And I think that given what
10 the result of the RDAP Program is, taking 12 months off
11 somebody's sentence, I would object to that.

12 THE COURT: So, we can bring an end to this,
13 but not to take any shortcuts, I mean, the dilemma is, I
14 think, out of respect to family and friends, because it
15 really didn't have anything to do with any sentence I
16 imposed. There is some issue about how accurate our
17 family history is, and if there is some issue there. I
18 think the simple way to answer it, whether it is exactly
19 as Mr. Ardolf has explained to the probation officer or
20 there was some issue -- and of course, there would be
21 issues of mixing liquor, or hard liquor, or non-hard
22 liquor with any medication, that is always a separate
23 issue. But, I will just order the evaluation, and we
24 will see what they -- we will see what they say.

25 And then if somebody from the Bureau lets us

1 know that it was irresponsible for the Judge not to
2 consider this or that -- again, I am not so sure I will
3 get that kind of contact from them with respect to the
4 program, but I will at least pursue it. Because that is
5 ironically what they do in the state system, or they
6 used to before I left there a long time ago prior to
7 sentencing. If they didn't know for sure, they would do
8 the evaluation.

9 We will check into that. I will decline at
10 this time. I will take the formal request, so there is
11 no claim that there was an agreement today, formal
12 request to recommend RDAP without -- I will decline to
13 do that today. I will tell you how it works, Mr.
14 Ardolf. It likely wouldn't affect where you -- the
15 placement on a sentence of this length now, because one
16 of the things that I think shouldn't happen is the more
17 common issue with the Bureau these days, because they
18 wait until you have about three years left of your
19 sentence, and then we will see people transferred.
20 Because I get complaints from families saying, I thought
21 you recommended the program.

22 They just sent my dad or my husband or my
23 friend or my brother or sister for that matter to this
24 facility, and they don't have the program. Well, in the
25 longer sentence they move people, because there is such

1 a waiting list in most of these programs. But, we will
2 look into it, because that is the leading cause of
3 people returning to the system is an unaddressed alcohol
4 or drug problem. It is just that the information is not
5 entirely clear to me in this instance, but we will
6 pursue it.

7 Anything else, Mr. Rank?

8 MR. RANK: No, Your Honor.

9 MR. O'BRIEN: No, Your Honor.

10 THE COURT: Any questions of me, Mr. Ardolf,
11 whether it relates to my comments on the appeal or any
12 other issue?

13 THE DEFENDANT: No.

14 THE COURT: We are adjourned.

15 (Adjournment.)
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17
18

19 Certified by: s/ Jeanne M. Anderson

20 Jeanne M. Anderson, RMR-RPR
21 Official Court Reporter
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I N D E X

Government's Witness:

ROBERT CAMERON

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